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Supreme Court, U.S.
FILED
94 909 NOV 18 1994
OFFICE OF THE CLERK

No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HUGO PRINCZ,
Petitioner,

v.

THE FEDERAL REPUBLIC OF GERMANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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115 pp

QUESTIONS PRESENTED

1. Whether a district court order denying a motion to dismiss by reason of foreign sovereign immunity is immediately appealable under the collateral order doctrine, and whether the notice of such an appeal automatically stays all proceedings below.

2. Whether, when a foreign government deliberately fails to honor the validity of United States passports for reason of the race, religion, or national origin of the United States citizen passport holders, intentionally commits acts of genocide, extrajudicial killing, torture and enslavement against the passport holders, and thereafter refuses to negotiate reparations for such conduct with the Department of State, the foreign government has implicitly waived its foreign sovereign immunity within the meaning of 28 U.S.C. § 1605(a)(1).

3. Whether, when a foreign sovereign engages in slavery as a regular course of commercial conduct and in the course of that commercial conduct enslaves a United States national by leasing his person to for-profit commercial concerns for a daily rate and when the materials produced by the commercial concerns were sold for profit to the foreign sovereign for use in a war effort against the United States, the nature of the foreign government's conduct constitutes commercial activity having a direct effect in the United States within the meaning of 28 U.S.C. § 1605(a)(2).

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IN THE

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

Hugo Princz petitions the Court that a writ of certiorari issue to review the judgment rendered in this case by the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals on jurisdiction under the Foreign Sovereign Immunities Act (App. C, 3a-42a) is reported at 26 F.3d 1166 (1994). The Opinion of the Court of Appeals on appellate jurisdiction under the collateral order doctrine (App. E, 44a - 45a) is reported at 998 F.2d 1 (1993). The Opinion of the United States District Court for the District of Columbia on jurisdiction under the Foreign Sovereign Immunities Act (App. G, 50a - 63a) is reported at 813 F. Supp. 22 (1992).

JURISDICTION

The judgment of the Court of Appeals was entered July 1, 1994 (App. C, 3a). The petitioner's timely petition for rehearing and suggestion for rehearing *in banc* were denied on August 22, 1994 (App. B, 2a, App. A, 1a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

§ 1291. Final decisions of district courts

The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ...

§ 1292. Interlocutory decisions

(b) When a district court judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1391(f), 1602-1611, reads in relevant part as follows:

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

§ 1603. Definitions

For purposes of this chapter —

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

STATEMENT

Germany committed acts of genocide, extrajudicial killing, torture and enslavement against an American family.

Petitioner Hugo Princz and his family were United States citizens residing in Europe at the outbreak of the Second World War. Mr. Princz and his family were arrested as enemy aliens of the German government approximately ninety days after the bombing of Pearl Harbor. Because petitioner and his family were Jewish Americans, the government of Germany, over the protestations of Mr. Princz' father, refused to honor the validity of their passports and failed to return the Princz family to the United States as part of an International Red Cross civilian prisoner exchange; instead, they were sent to concentration camps. Petitioner Hugo Princz' father, mother and sister were exterminated at Maidenek. Petitioner and his two younger brothers were transported, by cattle car, to Auschwitz to serve as slave laborers. There they were registered as Jewish Americans — "Juda USA" — and furnished with prison garb stenciled "USA" across the chest. Mr. Princz and his two brothers persons' were leased by the German government to the private German chemical cartel I.G. Farben, where they worked as laborers at chemical production facilities.

At Auschwitz, in separate incidents, Mr. Princz was forced to watch helplessly while his two injured brothers were intentionally starved to death. From Auschwitz he was shipped to the Warsaw Ghetto by rail and was subsequently transferred, by death march, to the Dachau slave labor facility where his person was leased to the Messerschmidt aircraft company as a laborer.

In the closing days of the war, Germany elected to exterminate certain slave laborers, including Mr. Princz, in an effort to destroy incriminating evidence of war crimes. Hours

before his scheduled execution, United States armed forces liberated the train carrying him toward an extermination camp. The liberating soldiers recognized Mr. Princz as an American by the designation "USA" that the Germans had stenciled on his camp garb. Desiring that he receive the best possible care, the United States Army sent him to an American military hospital for treatment. That act probably saved Mr. Princz' life. However, since he was never processed through a Center for Displaced Persons, Germany also used that act to justify its denial of reparations for Mr. Princz.

After recuperating, Mr. Princz was given permission to reenter Communist-occupied Czechoslovakia to search for his immediate family members and to inventory the remains of his father's business holdings.[1] Upon determining that the other members of his immediate family had not survived, Mr. Princz traveled to the United States to be with his relatives.

Germany rebuffed all diplomatic efforts to include Mr. Princz, the only known Nazi death camp survivor imprisoned as an American, within its reparations programs.

After the war, the German government established a reparations program for "survivors," to which Mr. Princz made timely application in 1955. Germany alleges contributions to the program have exceeded 60 billion United States dollars. Mr. Princz, however, was denied reparations, including participation in a pension program for survivors, solely because he was a U.S. national at the time he was a

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[1]Czech communists later expropriated all U.S.-owned assets in Czechoslovakia. Mr. Princz eventually received a prorated share of the value of the assets expropriated in the amount of approximately $11,000. *In the matter of Hugo Princz, Dora Princz Schwartz, and Isidor Princz*, Foreign Claims Settlement Commission of the United States, Decision No. CZ-3464 (Sept. 14, 1962).

slave laborer in the camps.[2]

Despite the diplomatic efforts of the Reagan, Bush and Clinton Administrations, the German Government has steadfastly denied Mr. Princz reparations. Diplomatic efforts were initiated by the Reagan Administration in 1983 at the request of the New Jersey congressional delegation. With the signing and subsequent ratification of the Treaty on the Final Settlement with Respect to Germany and a Related Agreed Minute (*in force* March 15, 1991) on September 12, 1990, Mr. Princz' diplomatic remedies were apparently exhausted. During the advice and consent process for the treaty, the Senate Foreign Relations Committee studied Mr. Princz' claim. At the request of Senator Helms, the Committee's ranking Republican, the Bush administration agreed to make a final, and ultimately unsuccessful, diplomatic effort on behalf of Mr. Princz. In order to avoid complicating the diplomatic process, the Department of State requested that Mr. Princz delay the commencement of litigation. Mr. Princz complied with the Department's request and delayed filing the complaint for approximately sixteen months, until just under one year from the Treaty's entry into force.

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[2]As a United States national during the war, Mr. Princz is not eligible because (1) he was not a German citizen; (2) he was not a stateless person resident in a Displaced Persons Center in Germany on 1 January 1947 (as a United States national he was free to leave at any time his medical condition would allow); and (3) he was not a national of one of the seventeen countries Germany occupied during the war and with which Germany subsequently concluded bilateral treaties making block settlements of claims.

After exhausting diplomatic remedies, Mr. Princz commenced litigation in the United States District Court and Germany's assertion of foreign sovereign immunity was denied.

After exhausting all available diplomatic remedies, on March 12, 1992, Mr. Princz commenced an action in tort and in quasi-contract before the United States District Court for the District of Columbia. In lieu of filing an answer, Germany filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, asserting foreign sovereign immunity. The German government's Motion to Dismiss was denied by Memorandum Opinion and Order entered December 23, 1992 (App. G, 50a - 63a). In denying Germany's motion to Dismiss, the District Court determined that neither Congress when enacting the Foreign Sovereign Immunities Act nor this Court when it considered *Argentine Republic* v. *Amerada Hess*, 488 U.S. 428 (1989), contemplated a factual scenario of this nature, and thus concluded that neither the *Amerada Hess* decision nor the Act barred this suit (App. G, 56a - 57a). The District Court scheduled the case for trial.

The Court of Appeals reversed by divided opinion, granting Germany immunity for acts of genocide, extrajudicial killing, torture and enslavement.

Germany appealed pursuant to 28 U.S.C. § 1291. The Court of Appeals denied a motion to dismiss for lack of appellate jurisdiction, holding that a denial of foreign sovereign immunity was immediately appealable under the collateral order doctrine and that the filing of the notice of appeal automatically stayed proceedings in the District Court (App. E, 44a - 45a). Germany also asked the United States to file an *amicus* brief in support of immunity. The State Department declined and admonished the German government to settle Mr. Princz' "legitimate and compelling claim." United States Department of State's Response to Note Verbale

No. 22/93 (April 13, 1993).[3]

The Court of Appeals reversed the District Court by divided opinion, holding that the Foreign Sovereign Immunities Act did apply to this case, but that none of the enumerated exceptions to foreign sovereign immunity, particularly those for commercial activity and implied waiver, existed.

With regard to the commercial activity exception, the majority below appears to concede that the enslavement of Mr. Princz was a commercial act, but rejected the commercial activity exception, holding that there was no direct effect of that activity in the United States because: there were necessarily many intervening steps between Hugo Princz' forced labor in German war materials plants and any effect thereof in the United States; and Hugo Princz' recuperation in an American military hospital and his subsequent efforts to find remaining family members, which delayed his return to the United States for approximately one year, by necessity, rendered the effects of his incarceration and enslavement indirect within the meaning of the Act (App. C, 13a - 16a).

With regard to the implied waiver exception, the majority below determined that Germany's treatment of Mr. Princz to be a *jus cogens* violation, but stated: that in the absence of an express Congressional directive to consider violations of *jus cogens* norms as implied waivers of foreign sovereign immunity, it would not impute to Congress the intent to subject a foreign government to the jurisdiction of the federal courts, even in these circumstances (App. C, 20a n.1); and that the *jus cogens* theory of waiver was incompatible with the "intentionality requirement" of § 1605(a)(1), and thus it

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[3]Embassy of the Federal Republic of Germany, Washington, D.C., to the United States Department of State, Office of the Legal Advisor (March 11, 1993) (Affixed to Appellee's Brief in the Court of Appeals at page 10 of the Addendum).

would not impute to Germany, by its commission of such atrocities against an American family alone, any intention to submit itself to the jurisdiction of the federal courts (App. C, 19a - 20a).

Judge Wald, in dissent below, also concluded that the Foreign Sovereign Immunities Act applied to this case and also found Germany's treatment of Mr. Princz to be a *jus cogens* violation. Differing from the majority, however, the dissent determined that the violation of *jus cogens* norms gave rise to an implied waiver of foreign sovereign immunity within the meaning of §1605(a)(1) (App. C, 31a - 42a). In reaching this conclusion, the dissent below considered several factors:

(1) that foreign sovereign immunity is a matter of grace and comity rather than a Constitutional right (App. C, 35a, *citing Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983));

(2) that the international community and the Executive Branch of the United States government refused to recognize German sovereignty for acts of genocide, extrajudicial killing, torture, and enslavement and, has on other occasions refused to recognize the sovereignty of a state which has violated *jus cogens* norms (App. C, 36a - 38a);

(3) that there exists a longstanding canon of statutory construction that domestic law be construed wherever possible in a manner consistent with international law (App. C, 38a, *citing The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804));

(4) that Congress intended to create a statutory regime which incorporated international legal standards (App. C, 39a, *citing* H.R. REP. NO. 1487, 94TH CONG., 2D SESS. at 14, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613), that there is no indication that Congress intended to exclude *jus cogens* violations from the scope of § 1605(a)(1) (App. C, 39a); and that the

examples provided in the legislative history of the implied waiver provision are neither exclusive nor exhaustive (App. C, 39a - 40a);

(5) that the implicit intentionality requirement of the implied waiver provision does not so much require the contemplation of being haled into a United States federal court as it requires that it would be held accountable for its actions (App. C, 40a - 41a); and

(6) that the exercise of jurisdiction over this case would not create a judicial interference with the notions of grace and comity between nations which underlie the Foreign Sovereign Immunities Act (App. C, 41a - 42a).

REASONS FOR GRANTING THE WRIT

The decision below raises fundamental and recurring questions about the proper interpretation of the Foreign Sovereign Immunities Act ("FSIA"). As a practical matter, those questions are now definitively settled because the statute creates a strong jurisdictional bias in favor of bringing FSIA cases in the District of Columbia Circuit. Unless this Court grants this petition for certiorari, continued application of the collateral order doctrine to FSIA cases will impede the orderly resolution of this class of cases (which includes a large number of routine commercial disputes) contrary to the intent of Congress and contrary to this Court's precedents. No less important, the Court should grant the writ in order to prevent the misconstruction of the "implied waiver" provision of the FSIA—a misconstruction that cuts off what Judge Wald (dissenting below) called "the last resort" for American victims of violations of the laws of nations. Finally, this Court should clarify the limits of the FSIA's "commercial activity" exception in order to prevent further waste of private and judicial resources in what has become an unsettled area of the law.

I. THE COURT OF APPEALS, BY HOLDING FOREIGN SOVEREIGN IMMUNITY DETERMINATIONS AMENABLE TO COLLATERAL ORDER DOCTRINE APPEALS, HAS DECIDED A FEDERAL QUESTION IN CONTRAVENTION OF AN ACT OF CONGRESS AND IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The judicial extension of the collateral order doctrine to foreign sovereign immunity determinations affects large numbers of cases every year,[4] the majority of which concern routine commercial disputes. The availability of collateral order doctrine review of foreign sovereign immunity determinations affects *all* cases brought under the Foreign Sovereign Immunities Act by delaying a foreign state's impetus to settle until after full appellate review of the district court's jurisdiction. Approximately ninety percent of federal question cases settle prior to the completion of the pretrial phase of litigation.[5] Settlement discussions in FSIA cases,

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[4]In the first ten years following the Act's passage, approximately 2000 cases were filed against foreign states. JOSEPH W. DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS vi (1988). Since January 1988, the federal district courts have made over forty foreign sovereign immunity determinations each year. A search on Westlaw revealed 272 foreign sovereign immunity determinations in the federal district courts between January 1, 1988 and November 10, 1994.

[5]Of 10,263 assorted federal question cases pending between July 1, 1993 and June 30, 1994, 2,160 settled before any court action. Of the remaining 8,103 cases, 6,724 settled before the pretrial phase, leaving 1,136. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICS DIVISION, ANALYSIS AND REPORTS BRANCH, TABLE C4 - UNITED STATES DISTRICT COURTS CIVIL CASES TERMINATED BY NATURE OF SUIT AND ACTION TAKEN (LAND CONDEMNATION CASES OMITTED) DURING THE TWELVE MONTH

absent the application of the collateral order doctrine, would also be most likely to occur at this time. Instead, an appeal under the collateral doctrine has become standard practice for foreign states whose motions to dismiss for lack of subject matter jurisdiction have been denied.

The collateral order doctrine is not necessary to protect the foreign state from harassing litigation or from incorrect determinations by the district courts. Foreign governments, like private party litigants, could still appeal the denial of their motion to dismiss on an interlocutory basis, with the certification of the trial judge. 28 U.S.C. § 1292(b). If the trial judge refuses to certify, relief may be obtained at the appellate level. Under the All Writs Act, 28 U.S.C. § 1651(a), a Court of Appeals may in its discretion grant a writ compelling the trial judge to certify the issue for interlocutory appeal, upon a showing of error.

Concerns of potential interference with foreign relations similarly provide no basis for the judicial construction extending the collateral order doctrine to encompass FSIA cases. In cases where the Department of State is concerned about the impact of litigation upon the conduct of foreign relations, it has noticed the courts to that effect. *See, e.g.*, *Jackson* v. *People's Republic of China*, 794 F.2d 1490 (11th Cir.), *reh'g and reh'g en banc denied*, 801 F.2d 404 (1986), *cert. denied*, 480 U.S. (1987); *Segni* v. *Commercial Office of Spain*, 816 F.2d 344 (7th Cir.), *reh'g denied*, (May 26, 1987); *Von Dardel* v. *U.S.S.R.*, 623 F. Supp. 246 (D.D.C. 1985), *vacated* 736 F. Supp. 1 (D.D.C. 1990). Germany asked the Department of State to issue a Statement of Interest on its behalf in this matter, and the Department refused to do so, instead admonishing Germany to settle Mr. Princz' "legitimate and compelling claim." United States Department of State's Response to Note Verbale No. 22/93, *supra* note 3.

PERIOD ENDED JUNE 30, 1994 (category: other federal questions).

Furthermore, prior to the commencement of litigation, Germany could have responded favorably to any of the several diplomatic overtures on Mr. Princz' behalf, thus precluding litigation altogether. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801); *reaffirmed*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 685 (1981). In this case, diplomatic remedies have been exhausted, and thus the conduct of foreign relations no longer has any significance for this case.

The application of the collateral order doctrine to FSIA cases results in the interlocutory appellate review of *all* foreign sovereign immunity determinations, even those involving routine commercial disputes in which the correct interpretation of the statute is not a close question. Appellate review under the collateral order doctrine allows foreign states to use a such an appeal as a dilatory tactic to wear down plaintiffs with prohibitive cost and time expenditures.[6] This results in unnecessary delays to a determination on the merits and the waste of private and judicial resources in *all* FSIA cases. *See, e.g., Linton* v. *Airbus Industrie*, 30 F.3d 592 (5th Cir), *reh'g and reh'g en banc denied*, 36 F.3d 92 (1994) (Petition for Certiorari pending, No. 94-684). For many commercial claims, particularly those of the individual or small business plaintiff, these costs may simply be prohibitive, thus effectively denying an entire class of plaintiffs a

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[6]The median duration of federal appeals in 1990, from the filing of the notice of appeal to the final disposition, was 10.1 months, with a high of 16 months in the Ninth Circuit and a low of 6 months in the Third Circuit. Thomas E. Baker & Denis J. Hauptly, *Taking Another Measure of the "Crisis of Volume" in the U.S. Courts of Appeals*, 51 WASH. & LEE L. REV. 97, 102 & n.38 (1994). By 1992, the median duration had increased to 10.6 months. Michael C. Gizzi, *Examining the Crisis of Volume in the U.S. Courts of Appeals*, 77 JUDICATURE 96, 98 (1993) (*citing* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL COURT MANAGEMENT STATISTICS 1992).

reasonable opportunity to adjudicate without regard to the merits of their claims.

The confusion resulting from this judicially extended doctrine is plainly contrary to the intent of Congress in enacting the FSIA, which was to provide "*comprehensive* provisions in our law . . . to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state", particularly for "ordinary legal disputes" in the commercial context. H.R. REP. 1487, 94TH CONG., 2D SESS. at 6-7, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 (emphasis added). As adequate remedies exist pursuant to certification, 28 U.S.C. § 1292(b), and writ of mandamus, 28 U.S.C. § 1651(a), for those close questions which truly merit interlocutory appeal, the extension of the collateral order doctrine to FSIA cases is superfluous and imposes unnecessary hardship upon private litigants in this entire class of cases.

The question thus is whether, absent an express grant of authority from Congress, foreign sovereigns may afford themselves the privilege of 28 U.S.C. § 1291 appeals under the collateral order doctrine or whether interlocutory appeals taken from orders of the district courts must be made under 28 U.S.C. § 1292(b). Neither the express language of the statute nor its legislative history unambigously resolves the issue.

It may be reasonably inferred, both from the Opinion of the Court of Appeals and from the Act's legislative history, that the FSIA sets forth comprehensive substantive and procedural standards controlling all suits brought against foreign nations in state and federal courts of the United States. The FSIA sets forth detailed procedural rules for suits against foreign states, including special rules governing venue (§ 1391(f)), jury trial (§ 1330(a)), service of process (§ 1608(a)), time to answer complaints (§ 1608(d)), counterclaims (§ 1607), punitive damages (§ 1606), default judgments (§ 1608(e)), procedures by which a foreign sovereign may remove actions from state courts (§ 1441(d))

and detailed procedures for execution upon foreign state-owned property (§§ 1609-1611). Each of these procedural rules operates for the protection and convenience of foreign state defendants.

Noticeably absent from any special procedural protections are matters associated with the taking of appeals. Where, unlike private parties, foreign states are afforded the same expanded timeliness requirements as the government of the United States with respect to the answering of complaints, *compare* 28 U.S.C. § 1608(d) and Fed.R.Civ.P. 12(a), they enjoy no such analogous procedural advantage with respect to the time for filing appeals. Nor is there any reason to conclude that Congress intended to afford foreign sovereigns the special privilege of collateral order doctrine appeals. Unlike the immunity afforded to United States government officials under the Eleventh Amendment, foreign sovereign immunity is not a Constitutional right; it is a privilege afforded foreign states by Act of Congress.[7] The substantive and procedural rights afforded a foreign sovereign in the assertion of its immunity are limited by the terms of the statute

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[7]Those Circuits which have applied the collateral order to foreign sovereign immunity determinations, by relying directly or indirectly on *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), have also concluded that the foreign state's right to immunity is analogous to a United States government official's Eleventh Amendment immunity from suit. *See, e.g., Weltover* v. *Republic of Argentina*, 941 F.2d 145 (2d Cir. 1991), *aff'd on other grounds*, 112 S. Ct. 2160 (1992); *Stena Rederi AB* v. *Comision de Contratos del Comite*, 923 F.2d 380 (5th Cir. 1991); *Foremost-McKesson* v. *Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990); *Rush Presbyterian-St. Luke's Medical Center* v. *The Hellenic Republic*, 877 F.2d 574, 576 n.2 (7th Cir. 1989); *Marx* v. *Government of Guam*, 866 F.2d 294, 296 n.2 (9th Cir. 1989); *Gould* v. *Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988). *See also Pullman Construction Industries, Inc.* v. *United States*, 23 F.3d 1166, 1168-69 (7th Cir.), *reh'g and reh'g en banc denied*, (May 19, 1994) (dicta).

granting the immunity -- The Foreign Sovereign Immunities Act, which does not provide for appeals under 28 U.S.C. § 1291.[8]

This question is not unlike that faced in *Argentine Republic* v. *Amerada Hess*, 488 U.S. 428 (1989), where the Court determined that Congress' failure to enact a *pro tanto* repealer of the Alien Tort Statute in the FSIA did not affect the grant of foreign sovereign immunity in the FSIA, as the comprehensiveness of the Act was "intended to preempt any other State and Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns." 488 U.S. at 437-38. The result should be the same here.

Even if, in appropriate cases, foreign sovereign immunity determinations are subject to collateral order doctrine appeals, that cannot be the case here. Jurisdiction in this and other such similarly-situated matters is limited solely to that small group of interlocutory orders which qualify for appellate review in the absence of a final order under the collateral order doctrine. *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949). "To come within the 'small class' of . . . *Cohen*, the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy*, 113 S. Ct. 684, 688 (1993) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)).

Cohen's three pronged test cannot be met here. The District Court was circumspect in characterizing the

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[8]The FSIA, *inter alia*, codified the federal common law doctrine of foreign sovereign immunity. H.R. Rep. 1487 at 7, 1976 U.S.C.C.A.N. at 6605. Petitioner knows of no case prior to the FSIA's enactment in which the collateral order doctrine was applied to a foreign sovereign immunity determination.

circumstances of this case as mere allegations (App. G, 51a), conditioning its decision upon Mr. Princz proving his allegations by the usual burdens of proof in civil matters. Not surprisingly, neither the District of Columbia Circuit nor any other Circuit has previously considered the application of the collateral order doctrine to a matter involving an order predicated upon factual allegations which are "'enmeshed in the factual and legal issues comprising the plaintiff's cause of action,' *Mercantile Nat. Bank* v. *Langdeau*, 371 U.S. 555, 558." *Coopers & Lybrand*, 437 U.S. at 469 (footnote omitted), where the fact sensitive inquiry necessarily treads upon the same evidence as will be presented at trial. *Green* v. *Department of Commerce*, 618 F.2d 836, 840 (1980). *Cf. Foremost-McKesson, Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990) (reviewing a pure question of law). *See also In re Durensky*, 519 F.2d 1024, 1029 (5th Cir. 1975) (*citing American Fire and Casualty Co.* v. *Finn*, 341 U.S. 6, 17-18 (1951) ("An order denying a motion to dismiss for lack of jurisdiction is perhaps unique in its incapacity permanently to affect the rights of the moving party, for jurisdictional defects may be recognized by the court at any time, on the motion of the parties or on its own motion.")); *Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379, 382-83 (1884).

The appellate court granted Germany a right that even the United States federal government has not reserved to itself under the various statutory waivers to its immunity. *Pullman Construction Industries, Inc.* v. *United States*, 23 F.3d 1166, 1168-70 (7th Cir.), *reh'g and reh'g en banc denied*, (May 19, 1994) ("Does the word 'immunity' in 'sovereign immunity' itself support interlocutory appeal? Surely not, as the Court held in *Van Cauwenberghe*"). The Court, in *Van Cauwenberghe* v. *Biard*, 486 U.S. 517 (1988), determined that "[t]he critical question following *Mitchell* [v. *Forsyth*], is whether 'the essence' of the claimed right is a right not to stand trial. *Mitchell*, 472 U.S. at 525," 486 U.S. at 524, and

in the absence thereof, whether the mere allegation of the absence of personal jurisdiction as a result of immunity confers such a right. *Id.* at 526. In *Van Cauwenberghe*, as here, the underlying issue involved international comity between states: there, the obligation of a receiving state not to abuse the extradition process of the extraditing state, *id.* at 525; and here, the obligation of the forum state not to allow a foreign state to be subjected to unnecessary litigation. For reasons equally valid in both matters, principally that defendant will be represented by counsel and will not even be required to make an appearance at trial, the Court in *Van Cauwenberghe*, "conclude[d] that the right not to stand trial in a civil suit is not an essential aspect of a claim of immunity under the principle of specialty." *Id.* at 526. The result here should be the same, as review of jurisdiction may be had, if necessary, following a determination on the merits of the claim.

Without commenting on the merits, the United States found the order affirming the application of the collateral order doctrine to foreign sovereign immunity determinations and the attendant automatic stay of proceedings below to be of such significance that it petitioned the Court of Appeals to publish its order. Motion of the United States of America for Publication of this Court's [D.C. Circuit] April 14, 1993 Order (App. H, 64a - 67a). A decision of such widespread consequences, which has no statutory basis and is contrary to decisions of this Court, should be corrected.

II. THE COURT OF APPEALS, BY ERRONEOUSLY CONCLUDING THAT FOREIGN STATES WHICH COMMIT *JUS COGENS* VIOLATIONS AGAINST UNITED STATES NATIONALS ENJOY IMMUNITY FROM SUIT IN U.S. COURTS, HAS DECIDED A FEDERAL QUESTION IN CONTRAVENTION OF AN ACT OF CONGRESS AND INTERNATIONAL LAW, AND IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The protection of U.S. nationals from international terrorism and the satisfaction of claims arising from such attacks is an ongoing concern for the Department of State and the Executive.[9] Although the President and the Department of State do their utmost to press individual claims such as these, they are minor issues in comparison with the complex daily bilateral relations between states.

Congress enacted the FSIA in order to guarantee, where appropriate, the availability of an "urgently needed" forum for the determination of claims against foreign states which would be independent from the daily pressures of foreign relations, so that individual claims would not be lost among issues of greater national significance. H.R. REP. NO. 1487 at 7-9, *reprinted in* 1976 U.S.C.C.A.N. at 6605-6607. Congress recognized the practical difficulties of the Department's dual role in formulating the FSIA:

> A principal purpose of this bill is to transfer the determination of sovereign immunity from the

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[9]Over the last ten years, international terrorism resulted in 1701 United States casualties, of which 302 were fatalities. UNITED STATES DEPARTMENT OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, CASUALTIES CAUSED BY INTERNATIONAL TERRORISM, 1980-1993 (April 1994). To the best of petitioner's knowledge, there is no data available for casualties resulting from *jus cogens* violations other than terrorism.

> executive branch to the judicial branch, thereby *reducing* the foreign policy implications of immunity decisions and assuring litigants that these often crucial decisions are made *on purely legal grounds* and under procedures that ensure due process.

Id. at 7, *reprinted in* 1976 U.S.C.C.A.N. at 6606 (emphasis added). In the broad scheme of U.S.—German bilateral relations, the matter of reparations for Mr. Princz is a minor issue. Mr. Princz' claim provides an example of a "legitimate and compelling claim," *see* United States Response to Note Verbale 22/93, *supra* note 3, which, presumably because of the priority of other foreign policy issues, the Department of State pressed with less than its utmost vigor. This case thus falls precisely within that class of claims which Congress intended to protect by enacting the FSIA.

The majority and dissenting opinions below in this case concur that the acts committed by Germany against Mr. Princz were violations of *jus cogens* norms (App. C, 19a-20a, 27a), principles of international law "from which no derogation is permitted." (App. C, 17a, 31a). The appellate panel members disagree, however, as to whether *jus cogens* violations constitute an implied waiver of foreign sovereign immunity within the meaning of § 1605(a)(1) of the Foreign Sovereign Immunities Act (FSIA) (App. C, 16a-20a, 31a-42a).

Ostensibly, the majority and dissent below reach their differing interpretations as a matter of statutory construction (App. C, 18a-20a, 40a-41a). Yet the majority's chosen interpretation of § 1605(a)(1) demonstrates that its decision was not controlled by the FSIA's construction or its sparse legislative history. Instead, the majority decision was controlled by an overriding concern that such a decision would give rise to a torrent of foreign human rights litigation (App. C, 20a n.1). The majority's concerns are ill-founded because they are based on a misapprehension of the applicable law.

Any statutory interpretation flowing therefrom is necessarily ill-conceived.

The majority's error stems from its failure to examine and apply the nature of "comity" to the foreign sovereign immunity determination:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1894). By its nature, comity is a voluntary bilateral recognition by one nation for the acts of another and provides the basis for the existence of foreign sovereign immunity. *Cf. Foremost-McKesson*, 905 F.2d at 445. *Jus cogens* violations are so offensive to the bilateral comity between the nations involved that they give rise *per se* to an implied waiver of immunity by the offending sovereign. A subsequent refusal to negotiate a binding settlement of the claim in good faith with the injured national's government exacerbates the breach of comity between the two states.

The offense to comity between nations in this case lies only between the United States and Germany. The infliction of *jus cogens* violations by Germany, the torture and enslavement of petitioner, does not afford him the right to bring a civil action before the courts of any of the member states of the United Nations. To the contrary, the German infliction of *jus cogens* violations upon a passport-bearing United States national breached the bilateral comity between these two nations. Germany subsequently refused to

accommodate the Department of State in an attempt to reach a diplomatic settlement, which amplified the breach of comity. This refusal to negotiate perpetuated the breach of comity between the United States and Germany with regard to this matter, thus confirming the implied waiver of Germany's foreign sovereign immunity in United States courts.

Claims by "the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong" (App. C, 20a n.1) would *not* be permitted unless their victims were United States nationals. No matter how tragic the human suffering caused by such conduct, it would not offend the bilateral comity between the United States and the sovereign *jus cogens* violator. The majority's supposed torrent of foreign human rights litigation, necessarily brought under the Alien Tort Statute, would continue to be precluded by the teachings of *Argentine Republic* v. *Amerada Hess*, 488 U.S. 428, 438 (1989). *Accord, Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993) (declining to assert jurisdiction where the Argentine government committed *jus cogens* violations upon one of its own nationals, although jurisdiction was asserted on other grounds); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (declining to assert jurisdiction over an action for money damages resulting from a Libyan-sponsored terrorist attack in Israel where the intended victims were Israeli nationals).

The dissent below, citing *The Paquete Habana*, 175 U.S. 677, 700 (1900), *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), *MacLeod* v. *United States*, 229 U.S. 416, 434 (1913), and *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980), correctly concluded that international law is part of the law of the United States, that Congress intended the FSIA to "incorporate[ ] standards recognized under international law" and that the court should at least make an effort to construe the FSIA consistent with the *jus cogens*

norms of international law (App. C, 39a). If *jus cogens* norms are universally-recognized principles of international law, the only way to interpret the FSIA in accordance with international law is to construe the Act to encompass an implied waiver exception for *jus cogens* violations (App. C, 39a). This conclusion is the straightforward result of standard principles of statutory construction.

The majority below attempts to avoid this conclusion by stating "it is also our law that a federal court is not competent to hear a claim arising under international law absent a statute granting such jurisdiction." (App. C, 20a n.1). This statement is made in the absence of any reasoned effort to reconcile the FSIA with universally-recognized principles of international law,[10] and thus is in direct conflict with this Court's holdings that, wherever possible, a statute should be construed in a manner consistent with international

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[10]The majority argues that implied waiver requires some intentional act analogous to the examples found in the legislative history: an arbitration agreement or a choice of law provision (App. C, 19a). Although the petitioner disagrees with the majority's interpretation of the intentionality requirement, even under their reading of the statute, history does not bear out the majority's conclusion "that [n]either the present government of Germany [n]or the predecessor government of the Third Reich actually indicated, even implicitly, a willingness to waive immunity arising out of the Nazi atrocities." (App. C, 19a-20a). Germany surrendered to the Allies unconditionally and subject to such terms as the Allies would impose. Surrender by Germany: Terms Between the United States of America and Other Allied Powers and Germany (May 8, 1945), 59 Stat. 1857 (1945); Agreement Regarding the Defeat of Germany: Additional Requirements (September 20, 1945), § 3 ¶ 5, 3 Bevans 1254 ("The Allied Representatives will regulate all matters affecting Germany's relations with other countries. No foreign obligations, undertakings or commitments of any kind will be assumed or entered into by or on behalf of German authorities or nationals without the sanction of the Allied Representatives.").

law. *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982); *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 21-22 (1963); *MacLeod* v. *United States*, 229 U.S. 416, 434 (1913); *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

Only under limited circumstances is the conduct of a foreign sovereign so offensive to bilateral comity with the United States that it gives rise to an implied waiver of sovereign immunity within the meaning of § 1605(a)(1): 1) a *jus cogens* violation has been committed against a United States national; 2) the Department of State has determined the claim to be legitimate; *and* 3) the foreign state has refused to negotiate the claim in good faith with the Department of State. *Cf. Saudi Arabia* v. *Nelson*, 113 S. Ct. 1471 (1993) (no jurisdiction where the offending conduct was limited to an overzealous exercise of a legitimate police power); *Argentine Republic* v. *Amerada Hess*, 488 U.S. 428 (no jurisdiction where the violation of the laws of nations occurred against an alien corporation having no nexus with the United States). This rigorous test ensures that the district courts only hear claims under § 1605(a)(1) which give rise to true breaches of comity between the United States and the foreign state defendant, and that diplomatic remedies have been exhausted such that there is negligible interference with the conduct of foreign relations. These conditions are met in this case.

The abuse of Americans by foreign states in violation of the law of nations, as distinguished from the overzealous exercise of a legitimate police power, *Nelson*, 113 S. Ct. 1471, is a serious and recurring problem. Some Americans injured in this manner, in pursuing compensation for their injuries, have initiated cases against foreign states under the Foreign Sovereign Immunities Act. *See, e.g., Cicippio, et al.* v. *Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir. 1994) (Petition for Certiorari pending, No. 94 -730); *Smith, et al.*, v. *People's Socialist Libyan Arab Jamahiriya, et al.* (motion to dismiss pending in the United States District Court for the District of Columbia, No. 93-2568) (Pan Am Flight 103);

Hudson v. *People's Socialist Libyan Arab Jamhiriya* (pending in the United States District Court for the District of Columbia, No. 94-204) (Pan Am Flight 103). The court below has established a flawed analytical approach, and the strong dissent by Judge Wald highlights the need for guidance from this Court.[11] *See also Tel-Oren*, 726 F.2d at 775 (D.C. Cir. 1984) (Edwards, J., concurring) ("This case deals with an area of the law that cries out for clarification from the Supreme Court. We confront at every turn broad and novel questions about the definition and application of the 'law of nations.'").

III. THE COURT OF APPEALS, BY ERRONEOUSLY CONCLUDING THAT GERMANY'S ENSLAVEMENT OF AN AMERICAN CITIZEN THROUGH ITS LEASING OF HIS PERSON TO COMMERCIAL WAR MATERIALS MANUFACTURERS WAS NOT A COMMERCIAL ACTIVITY HAVING A DIRECT EFFECT IN THE UNITED STATES, HAS DECIDED A FEDERAL QUESTION IN CONTRAVENTION OF AN ACT OF CONGRESS.

As Justice Kennedy noted in *Nelson*, the "explicit language" of the FSIA does not limit the type of act which may give rise to an injury cognizable under the commercial activity exception. 113 S. Ct. at 1486 (Kennedy, Stevens and Blackmun, JJ., concurring in part and dissenting in part).

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[11]A disproportionate number of FSIA cases are brought in the District of Columbia Circuit because of the FSIA's venue provision, 28 U.S.C. § 1391(f), which ensures venue for these claims in the District of Columbia Circuit. For example, the *Cicippio* and *Smith* cases, respectively, involve Pennsylvania and Florida residents who brought their claims before the United States District Court for the District of Columbia Circuit.

Thus, claims sounding in tort can conceivably find a remedy through the commercial activity exception. In this case, Germany engaged in the commercial activity of leasing laborers, and Mr. Princz' claims arose from the course of these activities. Although the Court of Appeals did not determine whether Germany's slaving operations satisfied the Act's definition of commercial activity, it did distill the question into "a close one, viz. whether to pierce the sovereign veil, lest the purpose of the statute be frustrated by the machinations of a rogue government that in effect leases its immunity to a private party." (App. C, 14a). Mr. Princz' claims sounding in tort and in quasi-contract are based upon Germany's commercial relationship with private war materials manufacturers, and thus are based upon commercial activity within the meaning of the Act.

Federal courts have long struggled with the consideration of personal injury actions brought under the third clause of § 1605(a)(2), particularly with the determination of whether the commercial activity has had a direct effect in the United States. Over time, the courts settled on a "substantial and foreseeable" test gleaned from a reference in the legislative history to § 18 of the RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES (1965). This Court's decision in *Republic of Argentina* v. *Weltover* exacerbated the jurisprudential conundrum by rejecting the substantial and foreseeable test in favor of a test requiring that the effect be "an immediate consequence of defendant's . . . activity". 112 S. Ct. 2160, 2168 (1992) (citation omitted). That one sentence eviscerated the majority of the jurisprudence on the direct effects requirement in personal injury actions. The current direct effect test employed by most courts, including the majority below in this case (App. C, 14a), defines a direct effect

> [a]s one which has no intervening element, but rather flows in a straight line without deviation or interruption.

Upton v. *Empire of Iran*, 459 F. Supp. 264, 266 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979). This construction provides scant guidance to the courts.

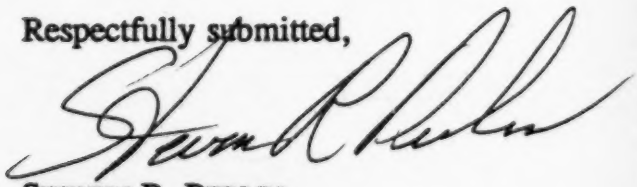
The Court has had occasion to clarify the definition of "direct effect" in other contexts. In commerce clause matters, for example, the Court held "the mechanical application of legal formulas [to define direct effect] no longer feasible." *Wickard* v. *Filburn*, 317 U.S. 111, 121-24 (1942). In *Wickard*, as in other cases, the Court has rejected the construction of a "direct effect" as requiring "the drawing of a mathematical line." *Santa Cruz Fruit Packing Co.* v. *N.L.R.B.*, 303 U.S. 453, 467 (1938) (Commerce Clause). *See also Kirshenbaum* v. *Walling*, 316 U.S. 517, 525-26 (1942) (Fair Labor Standards Act); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-5 at 310-11 (2d ed. 1988) (discussing "The Cumulative Effect Principle"). Similarly, for the FSIA, "[w]hat is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation." *Gully* v. *First National Bank*, 299 U.S. 109, 117 (1936) (discussing scope of federal "arising under" jurisdiction).

The private and judicial resources expended in addressing personal injury claims framed under the commercial activity exception demonstrates the importance of this question. Even if the Court determines that this question, standing alone, is not worthy of review, the recurring problems under the commercial activity exception make all the more imperative the elimination of the delays and uncertainties in FSIA litigation associated with the first two questions presented for review.

CONCLUSION

Although Mr. Princz' claim *vis-à-vis* Germany arose from events that are not likely to be repeated, the issues raised by the progress of his claim through administrative and diplomatic remedies, and the course of the litigation, transcend those unique circumstances. The availability of collateral order doctrine appeals of foreign sovereign immunity determinations unnecessarily prolongs the resolution of many claims and leads to a waste of private and judicial resources. Americans injured by foreign state violators of *jus cogens* will continue to seek remedies before the federal courts, and they will continue to plead exceptions to immunity under the implied waiver or the commercial activity provisions as warranted by the facts of their particular cases. The attendant delays and uncertainties frustrate litigants, judges, and most importantly, the intent of Congress in enacting the FSIA. This case provides an opportunity to resolve these issues. The Court should grant a writ of certiorari.

Respectfully submitted,



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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-7247 **September Term, 1993**
USDC CV 92-0644

Hugo Princz,
Appellee,

v. Filed August 22, 1994

The Federal Republic
of Germany,
Appellant

---

and Consolidated Case No. 93-7006

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph and Rogers, Circuit Judges

ORDER

Appellee's Suggestion For Rehearing In Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court in banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY: s/Robert A. Bonner
Deputy Clerk

APPENDIX B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-7247 **September Term, 1993**
USDC CV 92-0644

Hugo Princz,
Appellee,

v. Filed August 22, 1994

The Federal Republic
of Germany,
Appellant

and Consolidated Case No. 93-7006

BEFORE: Wald, Ginsburg, and Sentelle, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing, filed July 29, 1994, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY: s/Robert A. Bonner
Deputy Clerk

Circuit Judge Wald would grant the petition for rehearing.

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 5, 1993 Decided July 1, 1994
As amended July 1, 1994

Nos. 92-7247 and 93-7006

HUGO PRINCZ,
APPELLEE

v.

FEDERAL REPUBLIC OF GERMANY,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(92cv00644)

Peter Heidenberger argued the cause for appellant. With him on the briefs were Thomas G. Corcoran, Jr. and Kathleen S. Rice, Washington D.C.

Steven R. Perles argued the cause for appellee. With him on the brief was David E. Sher, Arlington, VA.

On the brief for amici curiae The Anti-Defamation League, The Intern'l Ass'n of Jewish Lawyers and Jurists, and

Faculty Members of the American University, Washington College of Law, were Jill Kahn Meltzer, Sheldon H. Klein, David M. Levine, Steven M. Roth, and Warren L. Dennis.

Nicholas N. Kittrie entered an appearance for amicus curiae Washington College of Law.

Before WALD, GINSBURG, and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

Dissenting opinion filed by Circuit Judge WALD.

GINSBURG, Circuit Judge:

Hugo Princz, a Holocaust survivor, brought suit in the district court against the Federal Republic of Germany to recover money damages for the injuries he suffered and the slave labor he performed while a prisoner in Nazi concentration camps. The district court asserted subject matter jurisdiction over Mr. Princz's claim, and Germany appealed pursuant to 28 U.S.C. § 1292. *See Foremost McKesson v. Islamic Empire of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990) (district court's denial of foreign state's motion to dismiss on ground of sovereign immunity held immediately appealable).

We now hold, for the reasons set out below, that the district court does not have subject matter jurisdiction of Mr. Princz's claims. Assuming that the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611, applies retroactively to events occurring in 1942-1945, no exception to the general grant of sovereign immunity in that statute applies in this case. If the FSIA does not apply retroactively, then there is no federal subject matter jurisdiction over Mr. Princz's claims, which sound in tort and quasi contract.

I. BACKGROUND

When the United States declared war against Nazi Germany in 1942, Hugo Princz, an American and a Jew, was living with his parents, his sister, and his two brothers in what is now Slovakia. The Slovak police arrested the entire Princz family as enemy aliens and turned them over to the Nazi SS. Rather than allow the Princz family to return to the United States as part of the civilian prisoner exchange then being conducted by the Red Cross, because they were Jews the SS sent them to concentration camps. Mr. Princz's parents and his sister were murdered at Treblinka, while Mr. Princz and his two younger brothers were sent to Auschwitz and then to Birkenau, where they were forced to work at an I.G. Farben chemical plant. After being injured at work, Mr. Princz's brothers were starved to death in the "hospital" at Birkenau. Mr. Princz was later marched to Dachau, where he was forced to work in a Messerschmidt factory. When United States soldiers liberated Mr. Princz at the end of the war, he was in a freight car full of concentration camp prisoners en route to another camp for extermination. The other liberated prisoners were sent to displaced persons camps, but because Mr. Princz is an American he was sent to an American military hospital for treatment.

After the war the government of the new Federal Republic of Germany established a program of reparations for Holocaust survivors. The German government denied Mr. Princz's 1955 request for reparations, however, because Mr. Princz was neither a German citizen at the time of his imprisonment nor a "refugee," within the meaning of the Geneva Convention, after the war. It appears that Mr. Princz would have qualified for reparations when the German government changed the criteria for eligibility in 1965, but he did not apply again before the statute of limitations ran in 1969.

Beginning in 1984 Mr. Princz, joined by the United States Department of State and members of the New Jersey congressional delegation, initiated a series of requests to the German government and the U.S. subsidiaries of I.G. Farben (BASF, Hoechst, and Bayer) for reparations in the form of *ex gratia* payments or the establishment of a pension fund; all such requests were denied. As the 1991 Treaty on the Final Settlement with Respect to Germany was awaiting ratification by the Senate, the Bush Administration attempted anew to resolve Mr. Princz's claim through diplomatic channels. That effort failed, as have the overtures that the Clinton Administration later made to the government of Germany.

In 1992, Mr. Princz finally resorted to federal district court, filing this action against Germany for false imprisonment, assault and battery, and negligent and intentional infliction of emotional distress, as well as recovery quantum meruit for the value of his labor in the I.G. Farben and Messerschmidt plants. After acceding to service of process, Germany moved to dismiss per Fed.R.Civ.P. 12(b)(1), asserting lack of subject matter jurisdiction owing to sovereign immunity, and under Rule 12(b)(6), asserting that Mr. Princz failed to state a claim upon which relief could be granted owing to the statute of limitations having run.

The district court held that it had jurisdiction of the case on the ground that the FSIA "has no role to play where the claims alleged involve undisputed acts of barbarism committed by a one-time outlaw nation which demonstrated callous disrespect for the humanity of an American citizen, simply because he was Jewish." 813 F.Supp. 22, 26 (D.D.C.1992). As we shall see below, that is not the law.

II. Analysis

Germany argues that the district court lacks subject matter jurisdiction over Mr. Princz's complaint for damages

sounding in tort and quasi contract because the FSIA is the only basis for obtaining jurisdiction over a foreign sovereign in the courts of the United States and this case comes within no exception to the rule of sovereign immunity codified in that Act. In the alternative, Germany argues that the FSIA does not apply retroactively to this case, and that Germany is therefore entitled to absolute sovereign immunity under the law of this circuit as it stood at the time the Nazis enslaved Mr. Princz. All of these questions concerning Germany's entitlement to sovereign immunity are matters of law for this court to consider *de novo*. *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2d Cir. 1994).

A. *What Law Applies?*

The FSIA was enacted in 1976. If it applies to this case, which arose from events occurring from 1942 to 1945, then it "provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439, 109 S.Ct. 683, 690, 102 L.Ed. 2d 818 (1989). Under the Act, the general rule is that of sovereign immunity, subject to various statutory exceptions.

If the FSIA does not apply to this case, then we are presumably remitted to the practice that prevailed in the federal courts during 1942-45, when the events now in suit occurred. During that time, indeed from 1812, when the Supreme Court decided *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 132, until 1952 the United States, as a matter of grace and comity, granted foreign sovereigns "virtually absolute immunity" from suit in the courts of this country. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 1967, 76 L.Ed.2d 81 (1983). For their part, the courts

> consistently ... deferred to the decisions of the political branches—in particular, those of the

> Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities.
>
> Until 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns.

Id. (citations omitted).

In the first half of the 20th century the "restrictive" theory of sovereign immunity increasingly gained international acceptance. Restatement (Third) of The Foreign Relations Law of the United States, Ch. 5 p. 391 (1987). Under this approach immunity is confined to the sovereign or public acts of the foreign state and does not extend to its commercial or private acts. The Department of State embraced the restrictive theory of immunity in 1952. Letter from Jack B. Tate, Acting Legal Advisor, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984-85 (1952), and in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 712-13, 96 S.Ct. 1854, 1869-70, 48 L.Ed.2d 301 (1976). Thereafter the State Department continued to advise courts on a case-by-case basis whether immunity should be granted; if in a particular case no advice was forthcoming, then the courts independently determined whether immunity was appropriate. *Jackson v. People's Republic of China*, 794 F.2d 1490, 1493 (11th Cir. 1986).

By enacting the FSIA in 1976, the Congress substantially codified the restrictive theory of sovereign immunity. *Commercial Bank of Kuwait*, 15 F.3d at 241; *Jackson*, 794 F.2d at 1493; H.R.Rep. No. 1487, 94th Cong., 2nd Sess. 7 (1976), U.S. Code Cong. & Admin.Serv. 1976, p. 6604. Neither the Supreme Court nor this court has yet determined, however, whether the Act applies that theory retroactively. Most courts that have considered the issue of retroactivity have held that FSIA does not apply to events

occurring before issuance of the Tate Letter in 1952. *See Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics*, 841 F.2d 26 (2d Cir. 1988); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1497-98 (11th Cir. 1986); *Slade v. United States of Mexico*, 617 F.Supp. 351 (D.D.C. 1985), *aff'd mem.* 790 F.2d 163 (D.C. Cir. 1986); *cf. Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 791 (2d Cir. 1980) (FSIA does not apply retroactively to case filed before effective date of statute); *but see Yessenin-Volpin v. Novosti Press Agency*, 443 F.Supp. 849, 851 n. 1 (S.D.N.Y. 1978) (Act, which merely codified restrictive theory of sovereign immunity adopted in 1952 Tate Letter applies retroactively to action of foreign government taken in 1976). The cases followed the general rule that "retrospective operation will not be given to a statute which interferes with antecedent rights or by which human action is regulated, unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'" *Union Pacific R. Co. v. Laramie Stock Yards*, 231 U.S. 190, 199, 34 S.Ct. 101, 102, 58 L.Ed. 179 (1913) (citation omitted). And they have held inapplicable the exception for purely remedial measures, because applying the FSIA "to pre-1952 transactions and events would affect foreign sovereigns' antecedent rights adversely." *Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics*, 665 F.Supp. 323, 339 (S.D.N.Y. 1987), *aff'd* 841 F.2d 26 (2d Cir. 1988). *Accord Jackson v. People's Republic of China*, 596 F.Supp. 386, 389 (N.D. Ala. 1984), *aff'd* 794 F.2d 1490 (11th Cir. 1986); *Slade*, 617 F.Supp. at 358.

There is a strong argument in favor of applying the FSIA retroactively, however. In declaring the purpose of the FSIA, the Congress directed that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602. This suggests that

the FSIA is to be applied to all cases decided after its enactment, i.e. regardless of when the plaintiff's cause of action may have accrued. *But see Jackson*, 596 F.Supp. at 388. Moreover, when it enacted the FSIA, the Congress deleted from 28 U.S.C. § 1332 the provision for diversity jurisdiction over suits brought by a United States citizen against a foreign government. According to the House Report on the FSIA, "since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous." H.R.Rep. No. 94-1487, 94th Cong. 2d Sess., 14 (1976). Unless one is to infer that the Congress intentionally but silently denied a federal forum for all suits against a foreign sovereign arising under federal law that were filed after enactment of the FSIA but based upon pre-FSIA facts, the implication is strong that all questions of foreign sovereign immunity, including those that involve an act of a foreign government taken before 1976, are to be decided under the FSIA. *See Yessenin-Volpin*, 443 F.Supp. at 851 n. 1.

Indeed, under the teaching of a recent Supreme Court case, application of the FSIA to the pre-1952 events here in suit may not even count as "a genuinely 'retroactive' effect". *Landgraf v. USI Film Products*, ____ U.S. ____, ____, 114 S.Ct. 1483, 1503, 128 L.Ed.2d 229 (1994). Only a statute that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed" is truly retroactive. *Id.* ____ U.S. at ____, 114 S.Ct. at 1505. A statute affecting jurisdiction, on the other hand, "usually 'take[s] away no substantive right but simply changes the tribunal that is to hear the case.' *Hallowell*, 239 U.S., 508, 36 S.Ct. at 202, [60 L.Ed. 409.] Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties,' *Republic Nat. Bank of Miami*, [*v.*

U.S.] 506 U.S. at [____, ____], 113 S.Ct. [554] at 565 [121 L.Ed.2d 474] (Thomas, J., concurring)." *Id.* ____ U.S. at ____, 114 S.Ct. at 1502. At least when one of the several states is a defendant, an expectation of immunity from suit is not such a "right." *See United States v. Alabama*, 362 U.S. 602, 604, 80 S.Ct. 924, 926, 4 L.Ed.2d 982 (1960) (upholding district court jurisdiction over suit against state pursuant to Civil Rights Act amendment enacted after suit filed); *but see Jackson*, 794 F.2d at 1497; *Carl Marks*, 841 F.2d at 27 (before Tate Letter, foreign sovereigns had settled expectation of immunity amounting to antecedent right). Similarly, it might be argued, application of the FSIA (and particularly application of an exception set out in the FSIA) to the events at issue in this case would not alter Germany's liability under the applicable substantive law in force at the time, i.e. it would just remove the bar of sovereign immunity to the plaintiff's vindicating his rights under that law. *See Landgraf*, ____ U.S. at ____, 114 S.Ct. at 1502 ("Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive").

We do not have to decide whether the FSIA applies to pre-1952 events, however, in order to resolve this case. For as will be seen in Part II.B below, even if the FSIA does apply here, none of the statutory exceptions to foreign sovereign immunity applies. On the other hand, if the FSIA does not apply to Mr. Princz's claims, and even if Germany is not immune from suit under the pre-FSIA law that would apply, then as will be seen in Part II.C, a federal district court does not have jurisdiction over Mr. Princz's claims because they arise in tort and quasi contract. Mr. Princz offers no case law, and we are aware of none, suggesting that a court can revive the pre-FSIA diversity jurisdiction of § 1332 over cases brought by a United States citizen against a foreign state

in order to entertain a case arising from pre-FSIA facts. In either event, therefore, the district court is without subject matter jurisdiction of the present case.

B. *The Foreign Sovereign Immunities Act of 1976*

Under the FSIA a foreign sovereign is immune from the jurisdiction of "the courts of the United States and of the States," except insofar as a particular case comes within one of the several statutory exceptions to the rule of immunity, 28 U.S.C. § 1605, or is governed by an international agreement to which the United States was a party when the FSIA was enacted. *Id.* § 1604. Mr. Princz invokes both the international agreement provision and two of the listed exceptions, viz. the exception for instances "in which the foreign state has waived its immunity either explicitly or by implication," *id.* § 1605(a)(1), and the exception for cases in which the claim arises from the foreign state's "commercial activity," as defined in the Act. *Id.* § 1605(a)(2). It is the burden of the foreign sovereign in each case to establish its immunity by demonstrating that none of the exceptions is applicable. *Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C.Cir. 1985).

1. The commercial activity exception.

Section 1605(a)(2) of the FSIA provides that a foreign sovereign and its agencies and instrumentalities:

> shall not be immune from the jurisdiction of the courts of the United States or of the States in any case ... in which the action is based ... upon an act outside the territory of the United States in connection with a *commercial activity of the foreign sovereign elsewhere* and that act causes *a direct effect in the United States.*

[Emphases added.] Mr. Princz argues that the Nazi government's leasing his labor for profit to the I.G. Farben

and Messerschmidt companies was commercial activity, and that it had a direct effect in the United States. Germany takes issue with both points.

a. Commercial activity.

"Commercial activity" is defined in the FSIA as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). The courts are instructed only that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* Otherwise, the FSIA leaves to the courts the "work[ing] out ... the distinction between commercial and governmental" activity. *Millen Industries, Inc. v. Coordination Council for North American Affairs*, 855 F.2d 879, 884 n. 6 (D.C. Cir. 1988), quoting *Hearings on H.R. 11315 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 94th Cong., 2d Sess. 53 (1976) (testimony of Monroe Leigh, Legal Advisor, Department of State).

As glossed by the Supreme Court, this means that in determining whether an activity is commercial, "the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.'" *Republic of Argentina v. Weltover, Inc.*, ____ U.S. ____, ____, 112 S.Ct. 2160, 2166, 119 L.Ed.2d 394 (1992) (citation omitted); *Millen Industries*, 855 F.2d at 884 ("A useful inquiry ... is whether the essence or central elements of an agreement made by a foreign state 'might be made by a private person,'" quoting H.R.Rep. No. 1487, 94th Cong., 2d Sess. 16 (1976)).

For its part, the government of Germany points out "that private parties do not take or hold prisoners." Mr.

Princz counters that the Nazi regime "leased slaves for money to German industrial concerns who in turn utilized the slaves in commercial interests." Each of these statements is, of course, true and the question is therefore a close one, viz. whether to pierce the sovereign veil, lest the purpose of the statute be frustrated by the machinations of a rogue government that in effect leases its immunity to a private party.

As it turns out, however, we need not decide whether leasing prisoners as slave labor constitutes a commercial activity under the FSIA. For certain it is that this activity did not have a "direct effect in the United States."

b. Direct effect in the United States.

To be "direct" within the meaning of the FSIA an effect need not be "substantial" or "foreseeable" so long as it is more than "purely trivial" and "it follows 'as an immediate consequence of the defendant's ... activity.'" *Weltover*, ____ U.S. at ____, 112 S.Ct. at 2168 (citation omitted). Germany here argues that the Nazis' enslavement of Mr. Princz in Poland and Germany "had no impact, much less an immediate consequence, in the United States." Mr. Princz, per contra, instances three such effects.

First, Mr. Princz argues that the work he was required to perform as a slave had a direct effect in this country because he worked for firms directly supporting the Nazi war effort against the United States. A "direct effect" however, "is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption." *Upton v. Empire of Iran*, 459 F.Supp. 264, 266 (D.D.C. 1978), *aff'd mem.* 607 F.2d 494 (D.C.Cir. 1979). Many events and actors necessarily intervened between any work that Mr. Princz performed—as a bricklayer for I.G. Farben in Poland or as a laborer in the Messerschmidt aircraft works in Germany—and any effect felt in the United States.

Mr. Princz's second argument is that the current government of Germany uses the mail, wire, and banking systems of the United States to administer pension and other reparation programs for the victims of the Third Reich, thereby providing the requisite "direct effect in the United States." Germany denies that it administers these programs in or from the United States. Even if it does, however, such activities, conducted years after the alleged "commercial activity" giving rise to this suit, can not be considered an "immediate consequence" of the enslavement of Mr. Princz and others. Again, there are too many intervening elements between the asserted cause and effect.

Finally, Mr. Princz argues that his continued suffering in the United States is a direct effect of his forced labor under the Nazi yoke. After Mr. Princz was liberated by the United States Army he spent time recuperating in a military hospital. From there he went to Czechoslovakia to search for relatives and to attend to his family's property, only after which did he move to the United States. Mr. Princz's subsequent suffering was clearly an effect, but just as clearly not "a direct effect in the United States" of the Nazis' actions. Mr. Princz was enslaved in Poland and Germany; the immediate consequences of his enslavement were felt in those countries, and much time passed before Mr. Princz came to this country. *See Martin v. Republic of South Africa*, 836 F.2d 91, 95 (2d Cir. 1987) (no "direct effect" where South African government allegedly caused permanent disability to American citizen who did not return to the United States until more than a year later).

The lingering effects of a personal injury suffered overseas can not be sufficient to satisfy the direct effect requirement of the FSIA. Otherwise, "the commercial activity exception would in large part eviscerate the FSIA's provision of immunity for foreign states." *Antares Aircraft L.P. v. Federal Republic of Nigeria*, 999 F.2d 33, 36 (2d Cir. 1993). Absent a clear indication to that effect, a court will not

attribute to the Congress the intention through an exception to undermine the general grant of sovereign immunity it was ostensibly ratifying. Thus, courts applying the FSIA have uniformly rejected the argument that a personal injury suffered overseas produces a direct effect in the United States when the injured person later returns home. *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C. Cir. 1988) (financial and marital difficulty suffered in United States as result of Saudi Arabian government's failure to pay American employee for work performed in Saudi Arabia not a "direct effect in the United States"); *Martin v. Republic of South Africa*, 836 F.2d 91, 95 (2d Cir. 1987); *Zernicek v. Brown & Root, Inc.*, 826 F.2d 415, 418-19 (5th Cir. 1987); *Australian Gov't Aircraft Factories v. Lynne*, 743 F.2d 672, 675 (9th Cir. 1984); *Tucker v. Whitaker Travel, Ltd.*, 620 F.Supp. 578 (E.D.Pa. 1985), *aff'd mem.*, 800 F.2d 1140 (3d Cir. 1986).

We therefore hold that even if the Nazis' leasing of Mr. Princz's labor was a "commercial activity" within the meaning of the FSIA, that activity did not have a "direct effect" in the United States.

2. The waiver exception of § 1605(a)(1).

Not surprisingly, there is no sovereign immunity in a case "in which the foreign state has waived its immunity either explicitly or by implication," 28 U.S.C. § 1605(a)(1) (with an exception not here relevant). Here the *amici* argue that the Third Reich impliedly waived Germany's sovereign immunity under the FSIA by violating *jus cogens* norms of the law of nations. In their own words: "A foreign state that violates these fundamental requirements of a civilized world thereby waives its right to be treated as a sovereign." With respect, we do not think that the waiver exception to the FSIA can be read so broadly.

A *jus cogens* norm is a principle of international law that is "accepted by the international community of States as

a whole as a norm from which no derogation is permitted...." *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C.Cir. 1988), quoting Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N.Doc. A/Conf. 39/27, 8 I.L.M. 679. Such peremptory norms are "nonderogable and enjoy the highest status within international law," *Committee of U.S. Citizens in Nicaragua*, 859 F.2d at 940; they "prevail over and invalidate international agreements and other rules of international law in conflict with them," and they are "subject to modification only by a subsequent norm of international law having the same character." Restatement, *supra*, § 102 comment k.

According to one authority, a state violates *jus cogens*, as currently defined, if it:

> practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.

Restatement, *supra*, § 702 and comment n. Before the Nuremburg trials, such outrages had not been expressly declared violations of the law of nations. David F. Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 Yale Journal of Int'l Law 332, 340 (1988); Fogelson, *supra* at 869. The Nuremberg Tribunal nonetheless punished Nazi officials for committing crimes against humanity:

> [The trials] for the first time made explicit and unambiguous what was heretofore, as the Tribunal has declared, implicit in International Law, namely, that to prepare, incite, or wage a

> war of aggression ... and that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, is an international crime.

R. Jackson, Final Report to the President on the Nuremberg Trials (Oct. 7, 1946) (*cited in* R. Jackson, The Nurnberg Case xiv-xv (1971)); *see also* Klein, *supra* at 340 and nn. 40-42; *The Nurnberg Trial*, 6 F.R.D. 69, 77-78 (1946). As the Ninth Circuit has explained:

> The universal and fundamental rights of human beings identified by Nuremberg—rights against genocide, enslavement, and other inhumane acts ...— are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*.

Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992). Indeed, it is doubtful that any state has ever violated *jus cogens* norms on a scale rivaling that of the Third Reich. *See* Steven Fogelson, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S.Cal.L.Rev. 833, 834 (1990).

The *amici* argue that interpreting the FSIA to imply a waiver where a violation of *jus cogens* norms has occurred "would reconcile the FSIA with accepted principles of international law." *Citing* Adam Belsky, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 Cal.L.Rev. 365 (1989). Although no reported decision considers the *amici*'s specific argument that a violation of *jus cogens* norms forfeits immunity under the implied waiver provision of the FSIA, the Ninth Circuit has stated broadly that "[t]he fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA." *Siderman de Blake*, 965 F.2d at 719.

Moreover, the *amici*'s *jus cogens* theory of implied waiver is incompatible with the intentionality requirement implicit in § 1605(a)(1). *See Foremost- McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C.Cir. 1990), *quoting Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985) (courts "rarely find that a nation has waived its sovereign immunity ... 'without strong evidence that this is what the foreign state intended'"); *accord Drexel Burnham Lambert v. Committee of Receivers*, 12 F.3d 317, 326 (2d Cir. 1993); *Joseph v. Office of the Consulate General*, 830 F.2d 1018, 1022 (9th Cir. 1987); *Zernicek v. Petroleos Mexicanos (Pemex)*, 614 F.Supp. 407, 411 (S.D.Tex.1985), *aff'd*, 826 F.2d 415 (5th Cir. 1987). That requirement is also reflected in the examples of implied waiver set forth in the legislative history of § 1605(a)(1), all of which arise either from the foreign state's agreement (to arbitration or to a particular choice of law) or from its filing a responsive pleading without raising the defense of sovereign immunity. *See* H.R.Rep. 1487, 94th Cong. 2d Sess., 18 (1976); Sen. Rep. 1310, 94th Cong. 2d Sess., 18 (1976). And as the Seventh Circuit has observed, "[s]ince the FSIA became law, courts have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity." *Frolova*, 761 F.2d at 377.

In sum, an implied waiver depends upon the foreign government's having at some point indicated its amenability to suit. Mr. Princz does not maintain, however, that either the present government of Germany or the predecessor government of the Third Reich actually indicated, even implicitly, a willingness to waive immunity for actions arising out of the Nazi atrocities. We have no warrant, therefore, for holding that the violation of *jus cogens* norms by the Third Reich constitutes an implied waiver of sovereign immunity

under the FSIA.[1]

3. The treaty provision.

Section 1604 of the FSIA provides that a foreign sovereign's immunity from suit is "[s]ubject to existing international agreements to which the United States [was] a party at the time of the enactment of [the FSIA]." One such agreement, the Hague Convention, in turn provides that the

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[1]Our dissenting colleague Judge Wald suggests, in effect, that because the Congress has not expressly excluded suits for the violation of *jus cogens* norms from the scope of § 1605(a)(1), international law requires that we "construe the [FSIA] to encompass an implied waiver exception" for such suits, thus providing jurisdiction over Mr. Princz's claims. Dis. Op. at 1184-85. While it is true that "international law is a part of our law," *Paquete Habana*, 175 U.S. at 700, 20 S.Ct. at 299, it is also our law that a federal court is not competent to hear a claim arising under international law absent a statute granting such jurisdiction. Judge Wald finds that grant through a creative, not to say strained, reading of the FSIA against the background of international law itself.

We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of § 1605(a)(1) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day—unless disrupted by our courts, that is.

Like Judge Wald, we recognize that this suit may represent Mr. Princz's last hope of reparation. Still, we cannot responsibly make the inferential leap that would be required in order to provide him with the federal forum he seeks.

inhabitants of an occupied country may not be required to "tak[e] part in military operations against their own country," (Article 52) and that "[a] belligerent party which violates [this prohibition] shall, if the case demands, be liable to pay compensation." (Article 3).

In the Nuremberg Trial decision the Tribunal makes official what is in any event clear, that the Nazi regime acted "in flagrant violation of the terms" of the Hague Convention, including Article 52. 6 F.R.D. 69, 123 (1946). Therefore, Mr. Princz argues, "the compensation provisions of the Hague Convention are in conflict with the FSIA's immunity provision, thus invoking its exception for prior existing treaty obligations." Binding precedent is clearly to the contrary, and clearly correct.

In *Amerada Hess*, the Supreme Court held that the treaty exception of the FSIA "applies when international agreements 'expressly conflic[t]' with the immunity provisions of the FSIA," and that an international convention that "only set[s] forth substantive rules of conduct and state[s] that compensation shall be paid for certain wrongs.... [d]o[es] not [necessarily] create private rights of action...." 488 U.S. at 442, 109 S.Ct. at 692. The cases are unanimous, however, in holding that nothing in the Hague Convention "even impliedly grants individuals the right to seek damages for violation of [its] provisions." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810 (D.C.Cir. 1984) (Bork, J., concurring); *accord Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968-69 (4th Cir. 1992); *Dreyfus v. Von Finck*, 534 F.2d 24, 30 (2d Cir. 1976); *Handel v. Artukovic*, 601 F.Supp. 1421, 1425 (C.D. Cal. 1985).

For the foregoing reasons, we conclude that none of the exceptions to sovereign immunity provided in the FSIA applies to the facts alleged by Mr. Princz. Therefore, we need not decide whether the FSIA applies retroactively to this case; for Mr. Princz' suit is barred by the FSIA even if we do give

retroactive effect to that Act—and more to the point, to the exceptions to sovereign immunity that it recognizes.

C. *Foreign Sovereign Immunity Under the Circuit Law of 1942-45*

What, then, if the FSIA does not apply retroactively to bar this case? In that event, Germany argues (albeit for the first time on appeal) that it is entitled to absolute sovereign immunity under the case law of this circuit as it stood during the period 1942-45, i.e. prior to the Tate Letter and to adoption of the restrictive theory of sovereign immunity. To this end Germany cites *United States ex rel. Cardashian v. Snyder*, 44 F.2d 895 (D.C. Cir. 1930) and *Matthews, United States Marshal v. Walton Rice Mill, Inc.*, 176 F.2d 69 (D.C. Cir. 1949).

Because subject matter jurisdiction cannot be created by consent, waiver, or even estoppel, *Insurance Corp. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104, 72 L.Ed.2d 492 (1982), we would consider this belated argument if it were of any consequence to federal jurisdiction of this case. It is immaterial, however, because there is no present basis for subject matter jurisdiction over Mr. Princz's claims in the district court regardless of the state of the circuit law concerning immunity in the period 1942-1945.

Until the passage of the FSIA in 1976, 28 U.S.C. § 1332 provided for federal diversity jurisdiction over a case brought by a United States citizen against a foreign state. When the Congress passed the FSIA, however, it deleted that grant of jurisdiction from § 1332. As noted above, the House Report on the FSIA states that "[s]ince jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous." H.R.Rep. No. 94- 1487, 94th Cong. 2d Sess., 14 (1976). New § 1330(a), in turn, asserts federal

jurisdiction over a suit against a foreign state only insofar as the foreign state is not entitled to immunity under the FSIA; and as we have already held, no exception to immunity under the FSIA covers this case.

Nor is this case within the federal question jurisdiction conferred by 28 U.S.C. § 1331, because Mr. Princz's claims against Germany sound in tort and quasi contract, not in federal law. Regardless whether Germany is entitled to sovereign immunity apart from the FSIA, therefore, the district court lacks subject matter jurisdiction over Mr. Princz's claims.

III. CONCLUSION

The district court lacks jurisdiction of Mr. Princz's claims. If the FSIA applies retroactively to the terrible events giving rise to this case, then it bars the suit, which comes within no exception in the Act. If instead the case is governed by the pre-FSIA law of sovereign immunity, then it is not within post-FSIA diversity jurisdiction of the district court. The judgment of the district court is therefore reversed and the case is

Dismissed.

WALD, Circuit Judge, dissenting:

The Holocaust indelibly scarred Hugo Princz. At the outbreak of World War II, Princz, a sixteen-year-old American Jew, found himself trapped in Czechoslovakia and unable to return to the United States. After America formally declared war against Germany, the Nazis seized Princz, his parents, his three brothers, and his sister as enemy aliens. The Nazis refused to exchange the family for German civilians detained by the United States as part of an International Red Cross program, instead forcibly transporting them to the

Maidanek concentration camp in Poland, where Princz and two of his brothers were torn from their parents and sister. Princz believes that German officials murdered his parents and sister at the concentration camp in Treblinka; he never saw them again.[1]

In May 1942, the Nazis transported Princz and his two brothers to the concentration camp at Auschwitz. There, they stripped Princz of his personal identity—tattooing him with the number "36 707" and requiring him to wear a prisoner's uniform with "USA" stenciled on the front. The Nazis then "leased" Princz and his brothers to I.G. Farben, a German chemical cartel, which enslaved the three brothers at a facility known as Birkenau. During his two years of forced labor at Birkenau and captivity at Auschwitz, Princz was the victim of unrelenting physical, mental, and emotional abuse. After each of his brothers suffered work-related injuries, Princz was subjected to the unimaginable horror of watching officials intentionally starve them to death at the Birkenau "hospital."

Bereft of family, Princz was sent to the Warsaw Ghetto for eight months. Princz's description of the time spent in the ghetto as a "relative respite" gives some indication of the atrocities witnessed by and inflicted upon him during his prior (and subsequent) enslavement and imprisonment. But the monstrosities did not end within Warsaw's walls. In October 1944, Princz was again transferred to the immediate custody of the Nazis and forced on a death march to Dachau, where he was enslaved as a laborer in the underground Messerschmidt airplane factory. Six months later, when it became clear the

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[1]At this stage, we may not question Princz's rendition of the horrors he suffered. In reviewing a motion to dismiss based in part on Federal Rule of Civil Procedure 12(b)(6), we must accept all of the plaintiff's allegations in the complaint as true. *See Moore v. Agency for Int'l Dev't*, 994 F.2d 874, 875 (D.C. Cir. 1993).

Allies would win the war, the Nazis sought to eliminate all evidence of the Holocaust, including the existence of slave laborers. Forced onto a cramped cattle train headed toward a mass execution in the Alps, Princz survived only because of the intervening German surrender. After searching futilely for traces of his family, Princz eventually returned to the United States.

For decades thereafter, using the available international compensation mechanisms, Princz sought unsuccessfully to obtain reparations from Germany for both the loss of his pension and the physical and mental suffering inflicted upon him during the war. Despite its public professions of penitence for the horrors of the Holocaust, however, Germany repeatedly relied on technicalities such as Princz's citizenship at the time of his enslavement to deny him either a pension or any restitution for his immense suffering. Ironically, had Princz not been an American citizen at the time of the Holocaust, he would have received compensation.

Finally, in March 1992, Princz filed suit in a United States federal district court, basing his claims against Germany on theories of false imprisonment, assault and battery, negligent infliction of emotional distress, and intentional infliction of emotional distress. Princz sought compensatory and punitive damages, as well as the value in quantum meruit of his labor at the I.G. Farben and Messerschmidt plants. The district court denied Germany's motion to dismiss for lack of subject-matter jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.* ("FSIA" or "Act"), ruling that the FSIA "has no role to play where the claims alleged involve undisputed acts of barbarism committed by a one-time outlaw nation which demonstrated callous disrespect for the humanity of an American citizen, simply because he was Jewish." *Princz v. Federal Republic of Germany*, 813 F.Supp. 22, 26 (D.D.C. 1992).

After we determined that the district court's jurisdictional decision was immediately appealable, *see Princz v. Federal Republic of Germany*, 998 F.2d 1 (D.C. Cir. 1993), Princz renewed his pursuit of a diplomatic remedy, and the political branches of the United States government voiced substantial support for his plight. In mid-November 1993, the United States Senate unanimously expressed its hope that President Clinton would raise the matter of reparations for Princz during his January 31, 1994 meeting with German Chancellor Helmut Kohl and "state publicly and unequivocally that the United States will not countenance the continued discriminatory treatment of Hugo Princz in light of the terrible torment he suffered at the hands of the Nazis." S. Res. 162, 103d Cong., 1st Sess. at 4 (1993). The House of Representatives overwhelmingly passed a similar resolution in late January 1994. *See* H. Res. 323, 103d Cong., 2d Sess. (1994). Nonetheless, diplomatic channels proved unavailing. When President Clinton raised the issue during the January 31, 1994 meeting, Chancellor Kohl reportedly refused to engage in any discussion of Princz while his case was pending before this court. Moreover, in a diplomatic note to the Department of State, the German government was quick to emphasize that the Chancellor's silence "is not meant to imply that out of court negotiations are contemplated at a later date." Note Verbale from the Embassy of the Federal Republic of Germany to the United States Department of State 4 (Feb. 2, 1994).

Due to Germany's unequivocal refusal to enter into any settlement with Princz, this appeal is his last resort. Contrary to my colleagues, who would deny Princz the opportunity even to present his claims in federal court, I would affirm the district court's order denying Germany's motion to dismiss on grounds of foreign sovereign immunity. I believe that Germany's treatment of Princz violated *jus cogens* norms of the law of nations, and that by engaging in such conduct, Germany implicitly waived its immunity from suit within the

meaning of s 1605(a)(1) of the FSIA. Accordingly, in my view, the federal courts have jurisdiction to entertain Princz's claims.

I. THE FSIA APPLIES

The FSIA, enacted in 1976, is the sole means of obtaining jurisdiction over a foreign state defendant in federal court. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 688, 102 L.Ed.2d 818 (1989). The first inquiry, therefore, is whether the FSIA applies to Princz's claims, which arose over thirty years before its enactment. While my colleagues articulate several persuasive reasons for applying the FSIA to this case, they do not decide whether it covers the heinous acts alleged here. I think that it does.

The Supreme Court has recently provided the following analytical framework for retroactivity analysis:

> [w]hen a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.

Landgraf v. USI Film Prods., ____ U.S. ____, ____, 114 S.Ct. 1483, 1505, 128 L.Ed.2d 229 (1994).

The language and legislative history of the FSIA

provide only ambiguous guidance on the retroactivity question. The "henceforth" language of § 1602[2] suggests that courts addressing claims filed after the effective date of the FSIA should apply the Act regardless of whether the underlying challenged conduct occurred before or after its enactment. *See* Majority Opinion ("Maj. Op.") at 7. Nonetheless, several courts have held that the "statutory language and legislative history of the FSIA provide no support for the retroactive application of the Act to transactions occurring before 1952," the year when the United States adopted the principle of restrictive immunity for commercial transactions. *Slade v. United States of Mexico*, 617 F.Supp. 351, 357 (D.D.C. 1985), *aff'd mem. op.* 790 F.2d 163 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1032, 107 S.Ct. 878, 93 L.Ed.2d 832 (1987); *accord Jackson v. People's Republic of China*, 596 F.Supp. 386, 388 (N.D. Ala. 1984), *aff'd* 794 F.2d 1490, 1497 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987); *Carl Marks & Co. v. U.S.S.R.*, 665 F.Supp. 323, 336-37 (S.D.N.Y. 1987), *aff'd* 841 F.2d 26 (2d Cir.), *cert. denied*, 487 U.S. 1219, 108 S.Ct. 2874, 101 L.Ed.2d 909 (1988). As evidence of the Act's prospective reach, these courts have focused on both the "henceforth" language of § 1602 and Congress' decision to delay the effective date of the FSIA for ninety days. *See Slade*, 617 F.Supp. at 357; *accord Jackson*, 596 F.Supp. at 388; *Carl Marks & Co.*, 665 F.Supp. at 336-37 (provision in § 1330(a) that district courts "shall have" jurisdiction over cases specified in §§ 1605 & 1607 indicates prospective application).

In the absence of any express congressional intent on the retroactivity issue, the next question is whether applying

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[2]Section 1602 provides that "[c]laims of foreign states to immunity should *henceforth* be decided by courts of the United States and the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602 (1988) (emphasis added).

the FSIA would "impair rights a party possessed when he acted," *Landgraf*, ___ U.S. at ____, 114 S.Ct. at 1505, *i.e.*, whether in 1942-45 Germany would have been entitled to immunity for imprisoning and enslaving Princz. Germany argues that in the 1940s our courts would not have allowed a sovereign to be sued absent its consent. The Supreme Court, however, has emphasized a different practice: deference by the courts to the case-by-case foreign policy determinations of the executive branch. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 1967-68, 76 L.Ed.2d 81 (1983); *see, e.g., Ex Parte Peru*, 318 U.S. 578, 587-89, 63 S.Ct. 793, 799-800, 87 L.Ed. 104 (1943) (ordering district court to relinquish in rem jurisdiction over Peruvian-owned vessel where Department of State recognized and allowed immunity of Peru); *Mexico v. Hoffman*, 324 U.S. 30, 36, 65 S.Ct. 530, 533, 89 L.Ed. 729 (1945) (exercising *in rem* jurisdiction in absence of State Department certification of immunity or evidence that the United States would customarily recognize immunity); *see also* Edward D. Re, *Human Rights, Domestic Courts, and Effective Remedies*, 67 ST. JOHN'S L. REV. 581, 583 (1993) (before 1952 executive branch would decide whether to espouse claims of injured citizens). As Chief Justice Stone remarked, "[i]t is ... not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Hoffman*, 324 U.S. at 35, 65 S.Ct. at 533. The operative question, then, is whether the executive branch would have recommended immunity for perpetrators of the Holocaust. The intuitive answer is no.

In the mid-1940s, Germany could not, even in its wildest dreams, have expected the executive branch of the United States, as a matter of grace and comity, to suggest immunity for its enslavement and confinement (in three concentration camps) of an American citizen during the

Holocaust. The outcome of the Nuremberg trials provides a clear signal that the international community, and particularly the United States—one of the four nations that established the Nuremberg Tribunal—would not have supported a broad enough immunity to shroud the atrocities committed during the Holocaust. Indeed, the Nuremberg Tribunal denied the German defendants' claims of official immunity because in the eyes of the international community Germany as a whole was owed no immunity: "[h]e who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under International Law." *The Nuremberg Decision*, 6 F.R.D. 69, 110 (1946). Clearly, had the question been put to them, the United States executive branch would have opted to deny Germany's claims to immunity for the crimes alleged in this case. *Cf. Bernstein v. N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375, 376 (2d Cir. 1954) (allowing district court to pass on validity of acts of officials of German government due to State Department letter "reliev[ing] American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials"). Accordingly, because the FSIA infringes upon no rights held by Germany at the time it enslaved and imprisoned Princz, it applies to this case. *See Bradley v. Richmond School Bd.*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 41 L.Ed.2d 476 (1974) ("a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice"). Germany would suffer no inequity from this result, but a contrary conclusion would indeed be manifestly unjust to Princz.

II. Implied Waiver Exception to Foreign Sovereign Immunity

The FSIA sets forth a general rule of foreign sovereign immunity followed by several exceptions. Jurisdiction lies whenever a litigant's claims fall within one of the statutory exceptions. One of these exceptions to immunity, the implied waiver exception, provides that a foreign state shall not be immune in any case in which the state "has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1) (1988). Because I believe that Germany implicitly waived its immunity by engaging in the barbaric conduct alleged in this case, I disagree with my colleagues' conclusion that none of the FSIA exceptions to foreign sovereign immunity apply.

Germany waived its sovereign immunity by violating the *jus cogens* norms of international law condemning enslavement and genocide. A *jus cogens* norm, also known as a "peremptory norm" of international law, "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 332; *see also* 1 Restatement (Third) of Foreign Relations Law § 102, cmt. k & Reporter's Note 6 (1987) [hereinafter Restatement (Third)] (adopting Vienna Convention's definition of *jus cogens*). *Jus cogens* norms are a select and narrow subset of the norms recognized as customary international law. *See Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988) [hereinafter *CUSCLIN*]. Sitting atop the hierarchy of international law, *jus cogens* norms enjoy the greatest clout, preempting both conflicting treaties and customary international law. *See* Restatement (Third) § 102, cmt. k (international agreements which violate

jus cogens norms are void); *see also United States v. Alfried Krupp*, IX TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG [SIC] MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 at 1395 (1950) (finding agreement between Germany and France authorizing use of French prisoners of war in German armament industry void under law of nations).

One need not pause long before concluding that the international community's denunciation of both genocide and slavery are accepted norms of customary international law and, in particular, are *jus cogens* norms. The Restatement (Third) of Foreign Relations Law defines customary international law as the "general and consistent practice of states followed by them from a sense of legal obligation." 1 RESTATEMENT (THIRD) § 102(2). To ascertain customary international law, judges resort to "the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators." *The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 299, 44 L.Ed. 320 (1900). These same tools are used to determine whether a norm of customary international law has attained the special status of a *jus cogens* norm. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992), *cert. denied*, ____ U.S. ____, 113 S.Ct. 1812, 123 L.Ed.2d 444 (1993). A *jus cogens* norm exists if the international community recognizes the norm as so fundamental that it is "nonderogable." *See CUSCLIN*, 859 F.2d at 940. While commentators may disagree on the exact scope of all *jus cogens* norms, there is universal consensus on the existence of norms against genocide and enslavement. *See, e.g., Siderman*, 965 F.2d at 715 (deeming rights against genocide and enslavement universal and fundamental); *CUSCLIN*, 859 F.2d at 942 (noting "universal disapprobation" aroused by slavery or genocide); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781, 791 n. 20 (D.C. Cir. 1984) (Edwards, J., concurring) (describing genocide and slavery as

"heinous actions—each of which violates definable, universal and obligatory norms"), *cert. denied*, 470 U.S. 1003, 105 S.Ct. 1354, 84 L.Ed.2d 377 (1985); Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253 (ratified by United States); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 7, 1948, 78 U.N.T.S. 277 (ratified by United States); *see also* 2 RESTATEMENT (THIRD) § 702(a) & (b), cmt. n (classifying norms against genocide and slavery as *jus cogens* norms); Advisory Opinion, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (May 28) ("the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation"); Adam C. Belsky et al., *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365, 389 (1989) [hereinafter *Implied Waiver*] (concluding that prohibition of slavery and genocide falls within category of *jus cogens* norms necessary to protect minimum standards of public order). What could be more fundamental than an individual's right to be free from the infliction of cruel and sadistic terrors designed with the sole purpose of destroying the individual's psyche and person because of the national, ethnic, racial, or religious community to which he belongs? What could be more elementary than a prohibition against eviscerating a person's human dignity by thrusting him into the shackles of slavery? Germany clearly violated *jus cogens* norms by forcibly extracting labor from Princz at the I.G. Farben and Messerschmidt factories and by subjecting him to unconscionable physical and mental abuse at the Auschwitz and Dachau concentration camps.

The international consensus endorsing the existence and force of *jus cogens* norms solidified in the aftermath of World War II. "The universal and fundamental rights of human

beings identified by Nuremberg—rights against genocide, enslavement, and other inhumane acts—are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*." *Siderman*, 965 F.2d at 715 (citations omitted). After the Nuremberg war crimes trials, the General Assembly of the United Nations unanimously approved a resolution affirming "the principles of international law recognized by the Charter of the Nurnberg [sic] Tribunal and the judgment of the Tribunal." *Affirmation of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal*, G.A. Res. 95(I), U.N. GAOR, 1st Sess., at 188, U.N. Doc. A/236 (1947). One of the United States prosecutors at the Nuremberg trials described these principles, known as the "Nuremberg Principles," as "an international legal force to be reckoned with." Telford Taylor, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 4 (1992). The Nuremberg Principles crystallized the pre-existing international condemnation of persecution and enslavement of civilians on the basis of race or religious belief, with the widescale atrocities committed by Hitler's Germany driving home the concept that certain fundamental rights may never be transgressed under international law. *See* Steven Fogelson, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S.CAL. L. REV. 833, 868 (1990); *see also Siderman*, 965 F.2d at 715 ("The legitimacy of the Nuremberg prosecutions rested not on the consent of the Axis Powers and individual defendants, but on the nature of the acts they committed: acts that the laws of all civilized nations define as criminal.").

The principle of nonderogable peremptory norms evolved due to the perception that conformance to certain fundamental principles by all states is absolutely essential to the survival of the international community. *See* Belsky, *Implied Waiver*, 77 CAL. L. REV. at 387. Were the conscience of the international community to permit derogation from these norms, ordered society as we know it would cease.

Thus, to preserve the international order, states must abdicate any "right" to ignore or violate such norms. As the German Supreme Constitutional Court has explained, *jus cogens* norms are those that "are indispensable to the existence of the law of nations as an international legal order, and the observance of which can be required by all members of the international community." Comment, *Jus Dispositivum and Jus Cogens in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court*, 60 AM. J.INT'L L. 511, 513 (1966) (emphasis added). Unlike general rules of customary international law (*jus dispositivum*), *jus cogens* norms are binding upon all nations; where as states are not constricted by customary international law norms to which they continuously object, *jus cogens* norms do not depend on the consent of any individual state for their validity. *See* David F. Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332, 351 (1988) [hereinafter *Customary International Law*]. Therefore, *jus cogens* norms have significant implications for the law of sovereign immunity, which hinges on the notion that a state's consent to suit is a necessary prerequisite to another state's exercise of jurisdiction.

To illuminate the intersection between *jus cogens* norms and the theory of foreign sovereign immunity, it is useful to begin by examining the evolution of the immunity doctrine. Granting a foreign sovereign immunity from jurisdiction has always been a matter of grace and comity, and is not required by the United States Constitution. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 1967-68, 76 L.Ed.2d 81 (1983). The Supreme Court first broached the question of foreign sovereign immunity in 1812, when it stated that states enjoy "exclusive and absolute" jurisdiction over their own territory. *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812). While

Justice Marshall's seminal opinion is most often cited for the proposition that foreign sovereigns enjoy virtually absolute immunity from suit in United States courts, *see, e.g., Verlinden*, 461 U.S. at 486, 103 S.Ct. at 1967-68, the decision in fact focused on the exceptions to exclusive territorial jurisdiction, which stem from a state's explicit or implicit consent to be intruded upon. *See The Schooner Exchange*, 11 U.S. (7 Cranch) at 136-42, 3 L.Ed. 287. Such consent derives from the interest in interstate relations, "which humanity dictates and its wants require." *Id.* at 136, 3 L.Ed. 287. Even in the early nineteenth century, therefore, states recognized that, to facilitate international relations, they must on occasion allow infringements on their exclusive territorial jurisdiction.

Prior to the Nuremberg trials, the positivist theory of international law governed state sovereignty, and a state's treatment of its own citizens was considered immune from the dictates of international law. *See* Anthony D'Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 AM. J. INT'L L. 92, 104 (1985); *see also* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2555 (1991) (Nuremberg trials "represented a radical innovation in international law" because previously international law had not imposed criminal penalties on a state's treatment of its own citizens). At Nuremberg, however, the four victorious powers of World War II tried German officials for "crimes against humanity," which included "murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war," even if the victims were German nationals. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, Aug. 8, 1945, pt. II, art. 6, 59 Stat. 1544, 1547 ("Nuremberg Charter").

The Nuremberg trials thus permanently eroded any notion that the mantle of sovereign immunity could serve to cloak an act that constitutes a "crime against humanity," even if that act is confined within the borders of a single sovereign state.

Because the Nuremberg Charter's definition of "crimes against humanity" includes what are now termed *jus cogens* norms, a state is never entitled to immunity for any act that contravenes a *jus cogens* norm, regardless of where or against whom that act was perpetrated. The rise of *jus cogens* norms limits state sovereignty "in the sense that the 'general will' of the international community of states, and other actors, will take precedence over the individual wills of states to order their relations." Mary Ellen Turpel & Phillipe Sands, *Peremptory International Law and Sovereignty: Some Questions*, 3 CONN. J. INT'L L. 364, 365 (1988). *Jus cogens* norms are by definition nonderogable, and thus when a state thumbs its nose at such a norm, in effect overriding the collective will of the entire international community, the state cannot be performing a sovereign act entitled to immunity. When the Nazis tore off Princz's clothes, exchanged them for a prison uniform and a tattoo, shoved him behind the spiked barbed wire fences of Auschwitz and Dachau, and sold him to the German armament industry as fodder for their wartime labor operation, Germany rescinded any claim under international law to immunity from this court's jurisdiction. *See* Belsky, *Implied Waiver*, 77 CAL. L. REV. at 396.

The exercise of jurisdiction over the Nazi officials at Nuremberg was by no means a single aberration in international law. Under the principle of universal jurisdiction, for certain offenses (including, but not limited to, *jus cogens* violations) a state can exercise jurisdiction over an offender in custody even if that state has neither a territorial link to the offense nor any connection to the nationality of the victim or offender. *See* 1 RESTATEMENT (THIRD) § 404, cmt. a & Reporter's Note 1. While it is rare for a nation to

exercise universal jurisdiction, Israel asserted jurisdiction under such a theory, among others, when it abducted Adolf Eichmann, the chief executioner of Hitler's "final solution," from Argentina and prosecuted him in Israel. *See Attorney General of Israel v. Eichmann*, 36 INT'L L. REP. 277 (Sup.Ct. Israel 1962). The most recent example of a prescription of jurisdiction by the international community over *jus cogens* violations carried out within the confines of a state's own territory is the United Nations' Statute of the International War Crimes Tribunal for the former Yugoslavia ("Statute"). Enacted as a response to the appalling atrocities committed against civilians caught in the brutal conflict in the former Yugoslavia, the Statute vests the War Crimes Tribunal with jurisdiction over, *inter alia*, crimes against humanity and genocide committed in the territory of the former Yugoslavia since January 1, 1993. *See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, U.N. Doc. S/25704, art. 1, at 36 (1993). The Statute contains absolutely no indication that foreign sovereign immunity could provide a valid defense to the exercise of the tribunal's jurisdiction. Thus the clear import of international law is to disavow a foreign sovereign's claims to immunity where that sovereign is accused of violating universally accepted norms of conduct essential to the preservation of the international order. In other words, under international law, a state waives its right to sovereign immunity when it transgresses a *jus cogens* norm.

It is a well-established canon of statutory construction that, because "[i]nternational law is part of our law," *Paquete Habana*, 175 U.S. at 700, we must, wherever possible, interpret United States law consistently with international law. *See The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *MacLeod v. United States*, 229 U.S. 416, 434, 33

S.Ct. 955, 961, 57 L.Ed. 1260 (1913) (statutes should be construed consistently with American obligations under international law); *see also Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) (U.S. courts bound by the law of nations). Indeed, the legislative history of the FSIA indicates that Congress intended the Act to create "a statutory regime which incorporates standards recognized under international law." H.R.REP. NO. 1487, 94th Cong., 2d Sess. at 14 (1976). The only way to reconcile the FSIA's presumption of foreign sovereign immunity with international law is to interpret § 1605(a)(1) of the Act as encompassing the principle that a foreign state implicitly waives its right to sovereign immunity in United States courts by violating *jus cogens* norms.

Construing § 1605(a)(1) to include as an implied waiver a foreign state's breach of a *jus cogens* norm is not at odds with the language and legislative history of the FSIA, which supply scant guidance as to the provision's meaning. The 1976 House Report lists two examples of implicit waivers which, at the time of the Report, had been recognized by United States courts: (1) where a foreign state has agreed to arbitration in another country; and (2) where a foreign state has agreed that the law of a particular country should govern a contract. *See* H.R. REP. NO. 1487, 94th Cong., 2d Sess. 18 (1976). In addition, the Judiciary Committee suggested one more example— "where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity." *Id.* This list is neither exclusive nor exhaustive, however, and courts are by no means constrained to these three examples of implied waiver. In *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 722 (9th Cir. 1992), for example, the Ninth Circuit concluded that where a foreign state attempts to use the courts of the United States to facilitate the persecution of an individual, it has implicitly waived its

claim to immunity from suit for such conduct.[3] *Cf. Amerada Hess*, 488 U.S. at 442-43, 109 S.Ct. at 692-93 (no waiver under § 1605(a)(1) where foreign state signed an international agreement containing no mention of a waiver of immunity to suit in the United States or even the availability of a cause of action in the United States). Nothing in the legislative history of § 1605(a)(1) forecloses a finding that a state implicitly waives immunity when it transgresses one of the few universally accepted norms known as *jus cogens*.

Moreover, I disagree with my colleagues that the "*jus cogens* theory of implied waiver is incompatible with the intentionality requirement implicit in § 1605(a)(1)." Maj. Op. at 1174. The implicit intentionality requirement stems from several decisions that have limited the implied waiver exception to cases in which the foreign sovereign "contemplated" the involvement of United States courts. *See, e.g., Seetransport Wiking Trader v. Navimpex Centrala*, 989 F.2d 572, 578-79 (2d Cir. 1993) (finding implicit waiver where defendant was an agency or instrumentality of a foreign state signatory to the Convention on the Recognition and Enforcement of Arbitral Awards and therefore must have contemplated enforcement actions in other signatory states, including the United States); *Siderman*, 965 F.2d at 721-22 (finding implicit waiver where foreign state defendant "not only envisioned United States court participation in its

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[3]I disagree, however, with the Siderman court's finding that the Supreme Court's approach in *Amerada Hess*, 488 U.S. at 436, constrained it to hold that because the FSIA does not specifically provide for an exception to immunity when a state violates a *jus cogens* norm, such a violation cannot confer jurisdiction under the FSIA. *Siderman*, 965 F.2d at 718-19. The Ninth Circuit failed to recognize that when a state transgresses a *jus cogens* norm, it does bring itself within the confines of an exception to the FSIA—the implied waiver exception.

persecution of the [plaintiffs], but by its actions deliberately implicated our courts in that persecution"); *cf. Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 378 (7th Cir. 1985) (no implicit waiver where no reason to conclude that foreign sovereign anticipated that international agreements to which it was a signatory would be enforced in U.S. courts). In inflicting theretofore unimaginable atrocities on innocent civilians during the Holocaust, Germany could not have helped but realize that it might one day be held accountable for its heinous actions by any other state, including the United States. *See supra* § I. The magnitude of the acts put the perpetrators on notice that they were violating "principles common to the major legal systems of the world." *Report to the President from Robert H. Jackson, Chief Counsel for the United States in the Prosecution of Axis War Criminals, reprinted in* 39 AM.J.INT'L L. 178, 186 (Supp.1945). Adhering to such principles, now termed *jus cogens* norms,[4] is an obligation *erga omnes*—an obligation of the state toward the international community as a whole—*see Barcelona Traction Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 4, 32 at ¶ 33 (Feb. 5), and by abdicating its responsibility to act in accordance with such norms, Germany consciously waived its right to any and all sovereign immunity.

Furthermore, a finding that Germany implicitly waived its immunity in this case is faithful to the primary rationale for the narrow construction of § 1605(a)(1)—preventing judicial

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[4]Although the *jus cogens* terminology gained new coinage after World War II and the Nuremberg trials, at the time of the war the norms prohibiting genocide and enslavement were already universally accepted as nonderogable. *See* Klein, *Customary International Law*, 13 YALE J. INT'L L. at 340 ("Long before Hitler came to power, the international community had been unanimous in considering acts such as those perpetrated by the Nazis to be criminal.").

interference with the notions of grace and comity that underlie the FSIA. *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 445 (D.C.Cir. 1990); *see also Seetransport Wiking*, 989 F.2d at 577 (broad interpretation of § 1605(a)(1) would "vastly increase the jurisdiction of the federal courts over matters involving sensitive foreign relations"). An exercise of jurisdiction over a foreign state for claims of genocide and enslavement does not awaken traditional comity concerns, particularly where, as here, both of the political branches of government have voiced strong support for the plaintiff.

In the absence of any indication that Congress intended to exclude from the scope of § 1605(a)(1) the concept that a foreign state waives its immunity by breaching a peremptory norm of international law, I believe that the only way to interpret the FSIA in accordance with international law is to construe the Act to encompass an implied waiver exception for *jus cogens* violations. Congress did not intend to thwart the opportunity of an American victim of the Holocaust to have his claims heard by the United States judicial system. Because I cannot agree that the FSIA requires us to slam the door in the face of Hugo Princz, I dissent.[5]

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[5]I of course hazard no opinion on the substantive validity of Germany's nonjurisdictional defenses and the ultimate availability of monetary relief for Princz. Because we found that the district court's finding of subject-matter jurisdiction was immediately appealable, the merits of this case are not before us.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Hugo Princz, Appellee,	)	Civil Action No. 92-0644 (Stanley Sporkin)
v.	)	
The Federal Republic of Germany, Appellant	)	

FILED APRIL 16, 1993

ORDER

In light of the decision of the Court of Appeals for the Distrcit of Columbia date April 14, 1993 regarding the above-captioned proceedings, it is hereby

ORDERED that all hearings and other proceedings before this Court in the above-captioned case are suspended pending further order from this Court.

Dated: 4/16/93

s/Stanley Sporkin
United States District Court

APPENDIX E

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed April 14, 1993

Nos. 92-7247 & 93-7006

HUGO PRINCZ,
APPELLEE

v.

FEDERAL REPUBLIC OF GERMANY,
APPELLANT

Appeals from the United States District Court
for the District of Columbia
(92cv00644)

ON APPELLEE'S MOTION TO DISMISS

Before: WALD and RUTH BADER GINSBURG, *Circuit Judges.*

ORDER

Upon consideration of the appellee's motion to dismiss, the opposition thereto, appellee's motion to exceed page limitations and the reply to the opposition to the motion to dismiss; appellant's emergency motion for stay, the opposition thereto and appellee's cross-motion for summary affirmance, and the reply; it is

ORDERED that the appellee's unopposed motion to exceed page limitations be granted. The Clerk is directed to file the lodged document. It is

FURTHER ORDERED that appellee's motion to dismiss be denied. A district court's denial of a foreign state's motion to dismiss on grounds of sovereign immunity is immediately appealable. *See Foremost-McKesson v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C.Cir. 1990). It is

FURTHER ORDERED that appellant's emergency motion for stay of all proceedings in the district court be denied as unnecessary. Because an appeal properly pursued from the district court's order divests the district court of control over those aspects of the case on appeal, *see Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 402, 74 L.Ed.2d 225 (1982) (*per curiam*) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."); *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir. 1989) (appeal from denial of claims of qualified immunity divested district court of jurisdiction), exclusive jurisdiction to resolve the threshold issue this case presents vests in this court, and the district court may not proceed to trial until the appeal is resolved. It is

FURTHER ORDERED that appellee's cross-motion for summary affirmance be denied. The merits of the parties' positions are not so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (*per curiam*); *Walker v. Washington*, 627 F.2d 541, 545 (D.C.Cir.) (*per curiam*), *cert. denied*, 449 U.S. 994, 101 S.Ct. 532, 66 L.Ed.2d 292 (1980).

Per Curiam

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT
April 7, 1993

Hugo Princz,	)	Civil Action No.
Appellee,	)	92-0644
	)	(Stanley Sporkin)
v.	)	
	)	
The Federal Republic	)	
of Germany,	)	
Appellant	)	
	)	

MEMORANDUM OPINION AND ORDER

SPORKIN, District Judge.

This matter is before the Court on Defendant's Motion for Stay of Proceedings pending its appeal of the Court's Order dated December 23, 1992 denying Defendant's motion to dismiss for lack of subject matter jurisdiction.

That Order was based on the Court's decision that a U.S. citizen, who was a victim of the Holocaust, has a constitutional right to proceed in a United States Court against the very nation that subjected him and his family to the most unspeakable and barbarous acts known to humankind ... [and that] under the circumstances of this case, a nation that does not respect the civil and human rights of an American citizen is barred from invoking United States law to block the citizen in his effort to vindicate his rights. In such a case, Plaintiff has a right to have his claim heard by a U.S. court. December 23, 1992 Memorandum Opinion and Order at 11-12.

The principal basis for Defendant's motion for a stay is its claim that Germany has shown a high likelihood of prevailing on the merits because this Court has no jurisdiction to entertain Plaintiff's action. The defendant somehow believes that the Court was tentative in its decision. In effect, it wants the Court to find that it erred in its prior decision and to hold that it has no jurisdiction to consider claims against a nation that (1) slaughtered in cold blood an American citizen's father, mother, two brothers and sister, all U.S. citizens; (2) forced a citizen of the United States to perform slave labor; (3) interned a citizen of the United States in various concentration camps solely because of his religion and citizenship; and (4) offered no, avenue of relief for the atrocities committed against Plaintiff in its own courts or through its administrative processes.

If Defendant believes this Court concurs in its assessment of the law, then it has misread the Court's earlier Opinion. It has become obvious that Defendant wants to preclude Plaintiff from obtaining a decision on the merits of his claim. There is absolutely no place left for Plaintiff to go to obtain reparations from Defendant's alleged barbarism and unspeakable acts. It is clear that even at this late date, the defendant is unwilling to recognize that the unspeakable acts it committed against the Jews were reprehensible and must be remedied. How else can Defendant explain why it has repeatedly denied Plaintiff the modest pension he has sought for nearly 50 years?

What this Court does not understand is exactly why the Defendant needs a stay in this case. This Court thought that the only contested issue was whether an American citizen has the right to sue the German Government in a U.S. Court for the atrocities he and his family suffered at the hands of the German Government. If that is the only issue, there is no need for a stay, unless of course the German Government now wants to contest whether in fact the Holocaust happened or

that the German Government was responsible for it. If that is the case, then what the Defendant now wants is to deny that it was ever involved in the extermination of 6 million Jews or, if it was so involved, that its actions were somehow justified. It is totally mystifying to this Court why the German Government not only wants to attack this Court's jurisdiction, but also wants to reserve the right to contest the substance of Plaintiff's claim in the event it loses on the jurisdictional issue. Of course, if the German Government wants to try the Holocaust, this Court has no choice but to accommodate its wishes.

While it may seem unconscionable for the German Government to force the Plaintiff to reconstruct in a public forum the unbelievable atrocities he and his family were subjected to during the Holocaust, the Plaintiff will be required to do so if the German Government persists in its position not to concede the well-pled allegations of Plaintiff's complaint.

To put it another way, if it is not the German Government's intention to deny its responsibility for the Holocaust, then there is no need for a stay. The German Government has appealed this Court's ruling on jurisdiction. If Germany convinces the Court of Appeals that an American citizen cannot get redress in the Courts of his own land against a Government that has tortured and slaughtered his mother, father, brothers and sister and forced the Plaintiff himself to perform slave labor and was about to murder him when he was rescued by the Allied forces, then of course this litigation will be over and Defendant will have prevailed.

On the other hand, if this Court does have jurisdiction to consider Mr. Princz's complaint and the facts he alleges are conceded, then the only issue that remains is the amount of damages that should be awarded. A stay of such proceedings is not necessary to protect Defendant's rights. The defendant is entitled to litigate the amount of damages, and to require

that it do so in the event its appeal is denied will in no way overburden the Defendant or cause it irreparable harm. The only issue that the Defendant may possibly have given up by not getting a stay is the ability to contest liability.

In a way, Mr. Princz is a symbol. If the German Government had won World War II, many American families would have been destroyed, as the Princz family was. What is critical to remember is that the German Government was totally lawless and recognized no principles that bind the nations of the world together. Not only did the German Government defy the laws of all nations, but it even refused to turn the Princz family over to the International Red Cross so that the family could be returned to the United States at the time the United States entered the War. When Germany instead set out to annihilate the Princz family, it committed a crime that goes far beyond anything acceptable to the civilized world.

Mr. Princz was repatriated only after a very costly war was fought, in which thousands of U.S. soldiers lost their lives. What Germany lost on the battlefield, it now seeks to win in the U.S. courts. It would be one of the greatest ironies to permit the German Government to be able to deny an American citizen redress in his own nation's courts. All Mr. Princz seeks is to vindicate rights which the German Government unlawfully stripped from him during World War II. Justice Arthur Goldberg once remarked that the Constitution of the United States is not a suicide pact.[1] Despite Defendant's position, that concept, in this Court's view, still persists.

Accordingly, Defendant's motion for a stay is denied. An appropriate Order accompanies this Opinion.

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[1]See *Kennedy* v. *Mendoza-Martinez*, 83 S. Ct. 554, 563 (1963); *Aptheker* v. *Secretary of State*, 84 S. Ct. 1659, 1665 (1964).

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT
December 23, 1992

Nos. 92-0664

HUGO PRINCZ,
PLAINTIFF

v.

FEDERAL REPUBLIC OF GERMANY,
DEFENDANT

Steven R. Perles, Washington, DC, and David Sher, Arlington, VA, for plaintiff.

Peter Heidenberger, Chevy Chase, MD, and Thomas G. Corcoran, Jr., Berliner, Corcoran & Rowe, Washington, DC, for defendant.

MEMORANDUM OPINION AND ORDER

SPORKIN, District Judge.

This case is presently before the Court on defendant Federal Republic of Germany's Motion to Dismiss for lack of subject matter jurisdiction. Plaintiff, Mr. Hugo Princz, filed this action to recover damages sustained by him as a result of his internment by the Nazis during World War II. For the reasons stated below, Defendant's motion is denied.

I. Background

The background facts to this case as alleged by the plaintiff are as follows.

Mr. Princz is a Jewish American who was taken into custody by the Nazis during World War II and placed in a concentration camp for the duration of the War. At the time of his internment, Mr. Princz was an American citizen and an unemancipated minor, living with his mother, father, two brothers and a sister in what is now Czechoslovakia. His father, a naturalized American citizen, was engaged in business activities in Czechoslovakia. In 1942, approximately ninety days after the formal declaration of war between the United States and Germany, Mr. Princz and his family were arrested by the Slovak Fascist police, turned over to the German SS, and sent to Camp Maidanek in Poland.

Almost all Americans captured by the Nazis were released in a prisoner exchange sponsored by the International Red Cross. Mr. Princz and his family, all American Jews, were not released.

The atrocities committed by the German Government against the plaintiff and his family cannot adequately be described in words. Mr. Princz believes his parents and sister were killed in the concentration camp known as Treblinka. The German Government sent Mr. Princz and his two brothers to Auschwitz. Mr. Princz and his two brothers were then "leased" by the German Government to the German chemical cartel I.G. Farben and enslaved at a facility close to Auschwitz called Birkenau. During the course of his enslavement at Birkenau, Mr. Princz witnessed the intentional starvation of his two brothers. Mr. Princz was subsequently sent to the Warsaw Ghetto Camp, forced on the death march from Warsaw to Dachau, and enslaved at the Messerschmidt underground airplane factory. Mr. Princz is the only member of his family to survive the barbaric acts of the Nazi regime.

When World War II ended, Plaintiff was rescued from a freight car, packed with other half-dead concentration camp survivors, by U.S. troops. Most of the survivors were sent to Centers for Displaced Persons. Seeing that Mr. Princz had "USA" stenciled across his uniform, the U.S. troops sent him to an American military hospital instead.

For many years Mr. Princz has attempted to obtain a pension, as provided to thousands of other Holocaust survivors, or some other form of reparations from the West German government. The first German compensation act, providing for pensions for Holocaust survivors was passed in 1952. In 1955, Mr. Princz filed a claim for a pension. The United Restitution Office (URO), which was handling the disbursement of the pension funds, advised Mr. Princz that he was not eligible for a pension because he had been an American citizen at the time of his enslavement.

In 1965, the law providing for pensions administered by URO was amended. According to Mr. Princz, the 1965 amendment only extended the period during which survivors could file a claim through 1969. It did not expand the pool of eligible claimants.[1] For this reason he did not file a second claim pursuant to the 1965 law.

Subsequently, the Federal Republic of Germany set up a hardship fund of $1.2 billion to assist Holocaust survivors who, for excusable reasons, had not filed a timely application for a pension under the earlier laws. This fund is administered by the Jewish Claims Commission in New York; the German Government has no control over eligibility determinations or disbursement of the hardship funds.

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[1]Defendant asserts that the 1965 amendment did expand the scope of permissible claimants so as to have enabled plaintiff to file a claim under the law, but that the plaintiff failed to file such a claim. This is a disputed issue which is not before the Court at this time.

Mr. Princz did apply for a hardship payment from this fund. However, his counsel was advised that these funds are being reserved for genuine hardship cases. Since Mr. Princz has been able to work as a grocery clerk, and his wife has worked as a bookkeeper, he is not eligible to receive a hardship payment.

In 1984, Plaintiff sought the assistance of Senator Bradley of New Jersey, who subsequently enlisted the assistance of the U.S. Department of State. The German government formally advised the State Department that Mr. Princz did not qualify for any government-sponsored reparations. The State Department then attempted to obtain a so-called *ex gratia* reparation payment from the Defendant government, which declined to make such payment.

In 1986, counsel for plaintiff attempted to obtain an *ex gratia* payment from Germany. The Defendant's Embassy in the United States verified that Mr. Princz was a Holocaust survivor and requested that the German Foreign Ministry in Bonn submit such a request to the German Parliament. On December 8, 1987, plaintiff's counsel was advised that the German Foreign Ministry had declined to submit such a request.

According to counsel for Defendant at the December 11, 1992 hearing before this Court, Mr. Princz's situation was presented to the German Supreme Court, which held that the 1969 statute of limitations for filing pension claims was final, thereby precluding consideration of another application for a pension through the URO process at this time.[2]

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[2]Mr. Princz did not file a specific claim in the German courts against the Federal Republic of Germany. Rather, counsel for Germany advised the Court that, when presented with the issue involved in Mr. Princz's case, the German Supreme Court took up the matter as an administrative concern.

On March 15, 1992, a treaty concerning the unification of Germany between the United States and Germany became effective. To confirm an understanding reached between the United States and Germany in discussions leading up to this treaty, Germany's Federal Minister for Foreign Affairs sent a letter, dated 18 September 1990, to U.S. Secretary of State James Baker, in which he assured Secretary Baker that, after unification, the Federal Republic of Germany would "seek to provide expeditious and satisfactory resolution of claims of Jewish victims of the Nazi regime against the German Democratic Republic shortly after unification." This letter was attached to the State Department's September 24, 1990 report to the President on the treaty. Plaintiff has not received reparations as of this time.[3]

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[3]It is unclear whether the claims referred to in this letter included claims of both U.S. nationals who were interned in concentration camps and those whose property in occupied territories was expropriated during the War, or only claims of the latter. In a letter, dated September 11, 1990, Secretary Baker wrote to the German Foreign Minister to formally confirm the U.S. Government's position "concerning compensation to United States' citizens whose property was taken in the former Soviet Zone of occupation in Germany or in the Soviet sector of Berlin." The Secretary's letter continued, "[T]he United States is of the opinion that under international law claims of U.S. nationals that have been the subject of inter-governmental negotiation between the governments of the United States and the German Democratic Republic ... must be resolved in inter-governmental discussions between the Governments of the United States and the Federal Republic of Germany."

It is to these property claims of U.S. citizens that the German Foreign Minister's September 18, 1990 letter refers. The Foreign Minister's reference to the resolution of claims of Jewish victims of the Nazi regime does not specifically refer to U.S. citizens interned by the Nazis during the War. The Court does not understand why

Plaintiff believes that he is one of only two U.S. nationals who survived internment during the Holocaust. The other was captured in Holland and is receiving a pension.[4]

II. Jurisdiction

The sole issue before the Court at this time is whether or not the Court has jurisdiction over the Federal Republic of Germany to hear this case. Defendant, in its Motion to Dismiss, argues that since plaintiff's claim does not fit any of the exceptions to Congress' broad recognition of immunity to other nations contained in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, plaintiff's complaint must be dismissed.

Finding that Congress intended to enact a comprehensive statutory scheme governing U.S. courts' jurisdiction over foreign nations,[5] the Supreme Court in *Argentine Republic v. Amerada Hess*, 488 U.S. 428, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989), held that the FSIA is "the sole basis for obtaining jurisdiction over a foreign state" in U.S. courts. Jurisdiction in such a case "depends on the existence of one of the specified exceptions to foreign sovereign immunity" found in the FSIA. *Id.*, 488 U.S. at 435, 109

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the State Department has not raised Mr. Princz's claim with the Federal Republic of Germany subsequent to this correspondence and the signing of the unification treaty. In any event, its failure to do so does not affect the ruling on the motion presently before the Court.

[4]The treaty between the Defendant and Holland permits Holland to determine survivors' pension eligibility. Under Dutch law, any survivor who was captured in Holland can receive a pension.

[5]As noted by the Supreme Court, the legislative history supports this conclusion. *See* U.S.Code Cong. & Admin.News 1976 6604-6635.

S.Ct. at 688 (citations omitted). This is the clearly stated rule.[6]

This case does not merely involve a violation of international law. This case involves an American whose most fundamental rights of citizenship and as a human being were violated. Mr. Princz was interned by the Nazis. He was enslaved by the German Government and German companies. He witnessed the tortured deaths of his two brothers and lost both parents and his sister to German brutality as well. To describe Auschwitz, one of the two concentration camps where he was interned, as a human butcher shop would be generous. What individuals like the plaintiff in this case suffered in the Holocaust were acts of barbarism, committed by a merciless government in flagrant disregard of international law, the laws of civilized societies and all principles of human decency.

The German government showed absolutely no respect for the laws of any other nation. The government extended no rights at all to the plaintiff or any member of his family. The German Government exterminated five members of a law-abiding American family without due process of law. Their only "crime" was being American Jews.

The Supreme Court did not have such extraordinary facts as those presently before this Court in rendering its

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[6]As noted by the Supreme Court, the legislative history supports this conclusion. *See* U.S.Code Cong. & Admin.News 1976 6604-6635.

One District Court for the District of Columbia has applied *Hess* to hold that U.S. courts lacked jurisdiction in a case involving a claim brought on behalf of a Swedish diplomat against the Soviet Union for his alleged unlawful seizure in 1945, subsequent imprisonment and possible death. *Von Dardel v. Union of Soviet Socialist Republics*, 736 F.Supp. 1 (D.D.C. 1990). The plaintiff in that case, however, was not a U.S. citizen.

decision in *Hess*. And the Court cannot believe that, in enacting the Foreign Sovereign Immunities Act, Congress contemplated a factual scenario akin to that at bar, let alone that it intended to bar a U.S. citizen from seeking redress against a nation standing in the shoes of his or her would-be butcher in U.S. courts in a case such as this. Therefore, this Court concludes that neither *Hess* nor the FSIA itself bars this Court from hearing the plaintiff's claim.

This Court finds that the Federal Sovereign Immunities Act has no role to play where the claims alleged involve undisputed acts of barbarism committed by a one-time outlaw nation which demonstrated callous disrespect for the humanity of an American citizen, simply because he was Jewish. The Court cannot permit such a nation, which at the time these barbaric acts were committed neither recognized nor respected U.S. or international law, to now block the legitimate claims of a U.S. citizen by asserting U.S. law to evade its responsibilities.

A government which stands in the shoes of a rogue nation the likes of Nazi Germany is estopped from asserting U.S. law in this fashion. To allow otherwise would create a severe imbalance in the reciprocity and mutual respect which must exist between nations, and would work an intolerable injustice against the plaintiff and the principles for which this country stands. In a remarkable show of chutzpa, Defendant suggests that Mr. Princz sue I.G. Farben, one of the companies to whom the Nazis "leased" Mr. Princz. Perhaps I.G. Farben, one of the many companies complicit in the exploitation and extermination of hundreds of thousands of Jews during World War II should be held accountable for their crimes as Defendant suggests. This argument cannot absolve Defendant of its participation in these crimes against humanity. It only goes to show Defendant's complete lack of understanding of what this case is about. It was the German government which orchestrated and executed the mass

exploitation and genocide of millions of human beings during World War II. This case is about the German Government's responsibility for these crimes as they affected Mr. Princz. It is not only about slave labor. Defendant simply cannot be relieved of its responsibility because of the involvement of other parties in causing the unconscionable mistreatment and suffering of Mr. Princz.

Defendant also argues that Mr. Princz can press his suit in German courts. This is not an acceptable alternative. Not only has the German Supreme Court already issued an administrative determination which indicates that Plaintiff's claim would be denied, but, according to the plaintiff, no foreign national has ever successfully brought a case such as this in Germany. While the Court recognizes that the German government of today is a far cry from the government of Adolph Hitler, the intransigence and lack of compassion shown by the government in its declination to consider the pleas made by the U.S. Department of State and a U.S. Senator on behalf of Mr. Princz and in the proceedings before this court confirm the slim odds Plaintiff has of achieving redress in the courts of that nation.

Congress did indeed fashion a comprehensive scheme regarding U.S. courts' jurisdiction over foreign nations. But Congress has not stripped Americans of their rights of citizenship or of their right to be protected by our government and our laws just because they travel overseas. When he left the shores of the United States in the early 1940's, Mr. Princz did not leave his citizenship behind; when he lived in Czechoslovakia he carried his citizenship with him; and when he was seized without cause by the Germans, he still retained his American citizenship.

If Mr. Princz's citizenship means anything, it must mean that he can seek vindication of his rights in the courts of this nation. Congress cannot have intended to force Mr. Princz, an American citizen with scant financial resources, to

seek justice in the courts of the very country which so brutally violated his dignity and humanity and subsequently has indicated no willingness to recognize his just claim.

An American citizen cannot be denied access to the only forum that can vindicate his rights as a citizen by a nation that robbed him of those rights. To permit this case to go forward will only enable Mr. Princz to end his odyssey for basic justice, a journey that he embarked on some 30 or 40 years ago. It is one thing to relate the horrors the plaintiff has experienced at the hands of the Nazi government. It is another horrendous indignity to require this individual to spend the rest of his life seeking redress for the unspeakable crimes committed against him and his family by the defendant. An American court must be available to the plaintiff, particularly since every other avenue of redress has been foreclosed to him.

To put it in another way, a United States citizen, who was a victim of the Holocaust, has a constitutional right to proceed in a United States Court against the very nation that subjected him and his family to the most unspeakable and barbarous acts known to humankind. To hold otherwise would complete the stripping of Mr. Princz's most valuable rights of citizenship—a process begun many years ago when the German government brutalized and murdered his family, forced him on a death march and placed him in a slave camp. To accept defendant's position would make a mockery of the Holocaust memorial project, in which millions of dollars have been spent to erect a monument in this nation's capitol to memorialize the Holocaust and send a message to the world that it shall never happen again.

What this Court holds today is that under the circumstances of this case, a nation that does not respect the civil and human rights of an American citizen is barred from invoking United States law to block the citizen in his effort to vindicate his rights. In such a case, Plaintiff has a right to

have his claim heard by a U.S. court.[7]

APPENDIX A

Excerpt from Transcript of December 11, 1992 Hearing in Civil Action No. 92- 644, pp. 12-15.

MR. PERLES: He is only one of two American citizens who are Holocaust survivors, Your Honor ... that we know of. The other individual was captured in Holland, and he received a pension, because under Dutch law ... they go on a basis of where you were captured, not the nationality of the captured individual.

THE COURT: Well, was he originally a U.S. citizen and he was caught in Germany? What happened? How did he get into the concentration camp?

MR. PERLES: He was a U.S. National and at the time an unemancipated minor with his family. His father was a U.S. National, and an American businessman in what is now called Slovakia or Czechoslovakia, and they were arrested after—roughly 90 days after the bombing of Pearl Harbor. Their U.S. documents were destroyed. They were turned over by the Slovak Fascist police to the SS and their U.S. papers simply weren't honored.

THE COURT: And so he is—you say he was a U.S. National. Was he an American citizen?

MR. PERLES: Yes, he was an American citizen.

THE COURT: And his father was an American citizen?

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[7]Set forth in Appendix A to the Court's Opinion is a colloquy that took place at oral argument between Court and counsel for plaintiff. This colloquy is revealing as to what the plaintiff was subjected to during the Holocaust.

MR. PERLES: And his father was an American citizen. His father was a naturalized American citizen.

THE COURT: And so they put the whole family in the concentration camp?

MR. PERLES: That is correct, Your Honor. They should have been swapped in the International Red Cross sponsored prisoner exchange, which is what happened to almost all captured Americans. He was not—he and [h]is family were not Slovak.

THE COURT: Well, was he put in because he was Jewish, or was he put in because he was American?

MR. PERLES: Well, I can't answer that question, Your Honor. Presumptively he was put in because he was a Jewish American. But that's a question that I'm never going to be able to reconstruct. You know ... I have to ask an individual who was then 17 years old, what happened during this confused time. He may never know why he was never swapped.

THE COURT; And they put the whole family, the mother, father and the son in?

MR. PERLES: And brothers and sister[ ]. He is sole survivor.

THE COURT: Which concentration camp?

MR. PERLES: He and two brothers went to Auschwitz. His parents and his sister were presumptively killed in [Maidanek]. One brother escaped and was killed in the Warsaw ghetto uprising.

THE COURT: Where was the other one killed?

MR. PERLES: He was in the—he was a participant in the Warsaw ghetto uprising.

THE COURT: One brother.

MR. PERLES: One brother who escaped.

THE COURT: What about the other brother?

MR. PERLES: They were both killed in Auschwitz in Mr. Princz' presence. Two younger brothers were killed with him.

THE COURT: How were they killed?

MR. PERLES: They were starved to death in the Berkenau Hospital, Your Honor. And they were Americans. In fact, if you look at what we've been able to reconstruct of the German records, they indicate that Mr. Princz—that they knew Mr. Princz was an American National. In fact, the reason he doesn't have a pension is he never went to a center for displaced persons. The reason he didn't go to a center for displaced persons is because the Germans stenciled his nationality on his chest. It says USA on his uniform, and when an American [Army] corp[s] liberated him, they're pulling all these half dead people out of freight cars, and there is this man that says USA across his chest.

So instead of sending him with the rest of these half dead people to a center for displaced persons, they wanted to give him better medical treatment, so he went to an American military hospital. And he survived because he went to an American military hospital. But because he was never in that center for displaced persons, because he was in an American military hospital, he was not eligible under German law for a $500 a month pension.

This case is about Mr. Princz's 30 year quest for a $500 a month pension. I've been trying since March 9, 1986 to get this man his $300 to $500 a month pension ...

THE COURT: Have you filed in Germany? Have you brought any action in Germany?

MR. PERLES: We have not brought an action in Germany, and I must say I've read the—not the cases

themselves, but the scholarly works describing them. No foreign national has ever successfully brought a case in Germany, and I don't view it as a cost effective undertaking for someone of Mr. Princz' age and financial standing. It's just not a viable option for him.

THE COURT: So they robbed this person of his citizenship, of his life—I mean of his liberty. Go ahead.

MR. PERLES: And they won't give him a pension. That's the case.

ORDER

The Court currently has before it Defendant's Motion to Dismiss. Upon consideration of Defendant's motion and Plaintiff's opposition thereto, and after hearing oral argument from counsel for both sides, for the reasons stated in the foregoing Opinion, it is hereby

ORDERED that Defendant's motion is denied.

APPENDIX H

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

HUGO PRINCZ,	)	
	)	
Plaintiff-Appellee,	)	
	)	No. 92-7247, 93-7006
v.	)	
	)	
FEDERAL REPUBLIC OF GERMANY,	)	
	)	
Defendant-Appellant.	)	
	)	

MOTION OF THE UNITED STATES OF AMERICA FOR PUBLICATION OF THIS COURT'S APRIL 14, 1993 ORDER

Pursuant to Rule 14(e) of the Rules of this Court, the United States of America requests this Court to publish its April 14, 1993 Order in this case. In support of this motion, the United States states as follows:

1. The instant appeals were taken by the defendant-appellant Federal Republic of Germany ("FRG") from various district court orders rejecting its claim of immunity under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1300, 1602, et seq. FRG sought a stay of proceedings in this Court on the basis that immunity under the FSIA is an immunity from suit and therefore it should not be burdened with further trial proceedings while its appeal from the district court's denial of its claim of immunity is pending before this

Court.[1] Plaintiff-Appellant Hugo Princz opposed FRG's request for a stay and sought either dismissal of the appeal or summary affirmance of the district court's decision denying immunity.

2. On April 14, 1993, this Court (Wald and R.B. Ginsburg, JJ.), denied Princz's motion to dismiss the appeal or for summary affirmance. Order, at 1-2. The Court also denied FRG's motion for stay as "unnecessary," stating that

> [b]ecause an appeal properly pursued from the district court's order divests the district court of control over those aspects of the case on appeal * * *, exclusive jurisdiction to resolve the threshold [immunity] issue this case presents vests this court, and the district court may not proceed to trial until the appeal is resolved.

Id. citing, inter alia, Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) (per curiam); Apostol v. Gallion, 870 F.2d 1335 (7th Cir. 1989).

3. The United States believes this Order warrants publication under the standards announced in Rule 14(b) of the Rules of this Court. First, this Order "resolves" a "substantial issue" which, to our knowledge, has not been publicly ruled on by this Court — viz., whether a district court retains jurisdiction to proceed to trial when a defendant appeals the district court's denial of his claim of immunity from suit. D.C. Cir. R. 14(b) (1). In holding that an appeal in such circumstances divests the district court of jurisdiction to proceed, this Court has agreed with the similar holdings of the Ninth, Tenth and Seventh Circuits on this issue. See Cal-Almond, Inc. v. U.S. Department of Agriculture, 960 F.2d

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[1]The district court had previously denied FRG's request for a stay and had indicated its intention to proceed to trial. April 7, 1993 Memorandum Opinion and Order.

104, 105 (9th Cir. 1992); Stewart v. Donges, 915 F.2d, 574-78 (10th Cir. 1990); Apostol v. Gallion, 870 F.2d 1335, 1338-39 (7th Cir. 1989). See also Yates v. City of Cleveland, 941 F.2d 444, 448-49 (6th Cir. 1991) (discussing waiver of the appeal right). However, in contrast to these prior cases (which involved the issue of official immunity from constitutional violations), the instant ruling is in the context of an appeal from a denial of immunity under the FSIA. The Court's ruling, which is the first case to our knowledge to reach this issue under that statute, consequently resolves an important issue of "first impression." Such an important holding warrants publication. D.C. Cir. R. 14(b) (1).

Second, this holding "significantly clarifies a rule of law previously announced by the Court." D.C. Cir. R. 14(b) (2). In Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 443 (D.C. Cir. 1990), this Court held that a district court's "denial of the foreign state's motion to dismiss on the grounds of sovereign immunity" under the FSIA is immediately appealable to this Court. In reaffirming that rule (see Order, at 1), this Court has clarified an important incident of such an appeal — i.e., it generally divests a district court of jurisdiction to proceed to trial until the immunity issue is resolved. Thus publication is warranted.

Finally, the order is of "general public interest." D.C. Cir. R. 14(b) (7).[2] Sovereign immunity is a frequent threshold issue in suits against foreign sovereigns under the FSIA. Also, the federal government is frequently involved in the similar "threshold" issue of immunity of federal officers from suit for constitutional violations. See Mitchell v. Forsyth, 472

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[2]The other factors listed in Rule 14(b) for publication (calling attention to an overlooked rule of law, criticizing or questioning existing law, resolving an inter- or intra-circuit conflict or reversing a published district court decision) appear inapplicable to the present case.

U.S. 511 (1985); Harlow v. Fitzgerald, 457 U.S. 800 (1982) and cases cited pp. 2-3 supra. This Court's Order clarifies that a motion to stay is unnecessary when a defendant appeals a denial of a claim of immunity from trial (such as under the FSIA or official immunity).[3] Publication of the Court's Order will provide important guidance to both the district courts in this Circuit and to counsel on the procedures which should be followed in the event of an appeal from a denial of a claim of immunity from suit. It will also avoid the filing of many unnecessary stay motions, both before the district courts and before this Court.

For the reasons state above, the United States of America requests this Court to publish its April 14, 1993 Order in this case.

Respectfully submitted,

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May 1993

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[3]The other context in which courts have reached a similar result is when a criminal defendant seeks to appeal a denial of a claim of double jeopardy. See United States v. Hines, 689 F.2d 934, 936-37 (10th Cir. 1982); United States v. Leppo, 634 F.2d 101 (3d Cir. 1980); United States v. Dunbar, 611 F.2d 985 (5th Cir.) (in banc), cert. denied, 447 U.S. 926 (1980).